Supreme Court, U.S.
FILED
00-479 SEP 28 2000
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MENDENHALL,

Petitioner

VERSUS

SHERIFF THEODORE RISER, JR., individually & in his official capacity as Sheriff of Webster Parish; STEVEN CROPPER, JAMES BELL, ALVA NULL, and WAYNE NEWTON, individually and in their capacities as Webster Parish Deputy Sheriffs,

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Police Officer John Mendenhall was assisting another officer in apprehending a suspect who had shot one civilian and was shooting at others as he tried to escape. One of those civilians shot and killed the suspect in self-defense, but within 24 hours, the Sheriff's deputies had arrested Mendenhall for murder. In reversing the district court's denial of summary judgment for the deputies based on qualified immunity, did the Fifth Circuit Court of Appeals err by drawing inferences in favor of the movant, making credibility choices and weighing the evidence, contrary to *Reeves v. Sanderson Plumbing Products*, ___U.S. ___, 120 S. Ct. 2097 (2000)?

2.

Before Officer Mendenhall was arrested, he came to a police station, received *Miranda* warnings, and answered questions posed by the Sheriff's deputies until he realized that he was a murder suspect. At that point, he invoked his *Miranda* rights and refused to answer further questions until he talked to a lawyer. In reversing the district court's denial of summary judgment based on qualified immunity, did the Court of Appeals err as a matter of law by considering Mendenhall's post-*Miranda* silence as grounds for a reasonable deputy to believe he had probable cause for an arrest?

3.

In reversing the District Court's denial of summary judgment based on qualified immunity, did the Court of Appeals disregard *Williams v. Taylor*, ___U.S.___, 120 S. Ct. 1495 (2000), by defining the issue as "whether facts . . . support a finding that *no reasonable officer* could have believed probable cause existed. . . ."?

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, John Mendenhall, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on May 30, 2000.

OPINION BELOW

The Opinion of the divided three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on May 30, 2000, are reprinted in the Appendix to this Petition at App. A, pages 1a through 35a. The order of that court denying a stay of issuance of its mandate, entered on July 20, 2000, is reprinted in the Appendix to this Petition at App. D, page 39a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on May 30, 2000. It denied rehearing and rehearing en banc on July 5, 2000. (App. C).

This Court has jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment of the United States Constitution.

Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

La. Rev. Stat. § 14:20(2):

A homicide is justifiable:

. . .

(2) When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that

such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.

STATEMENT OF THE CASE

Having finished his graveyard shift in Haynesville in rural northwest Louisiana, police officer John Mendenhall was headed to his home in nearby Cullen when a Cullen police officer, J.W. White, requested his assistance at the scene of a shooting. Three men from out of town had kidnapped and shot a Cullen resident. Officer White had arrested two of the suspects, but the third – William Myles – escaped. Officer White asked Officer Mendenhall to find Myles, who had been sighted a few blocks away. (Rec.[1], page 215, Exhibit M, page 23).

Cullen is an all-black community[2], small and close knit. When word of Myles' location got out, several men spontaneously got in their vehicles and gave pursuit.[3] When Officer Mendenhall arrived, Myles was shooting indiscriminately with a .357 revolver at innocent civilians, including those in the occupied vehicles.[4]

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[1] "Rec.," refers to the Record Excerpts filed in the United States Court of Appeals.

[2] Rec., page 215, Exhibit E, page 14.

[3] Rec., page 215, Exhibit L, pages 44-45.

[4] Rec., page 215, Exhibit P, pages 7-9; Rec., page 274, Exhibit 4, pages 61-64.

Faced with this emergency, Officer Mendenhall pulled his service revolver but it jammed. He was in the process of retrieving his nine millimeter pistol from his briefcase[5] when Myles ran past him, slipped, and fired over his shoulder at Ted Nellams, a Cullen resident. Nellams shot back with his nine millimeter pistol and hit Myles in the back of the head.[6]

Officer Mendenhall witnessed the fatal shot. He immediately jumped out of his vehicle, pistol in hand, ran up to Myles, kicked his gun away and checked his pulse. Myles was lying on his back, a pool of blood collecting under his head. Officer Mendenhall determined that he was dead and asked a bystander to call an ambulance. Myles' gun lay on the ground beside him. As a precaution, Officer Mendenhall picked it up to check for live rounds. Finding none, he replaced the gun. (Rec., page 274, Exhibits 5, 6).

Officer Mendenhall was guarding the body when the ambulance arrived. He advised the paramedics that Myles had been shot in the back of the head. Officer White arrived, so Mendenhall left briefly to go to the hospital to check on the man Myles had shot - Deion Grisby, a personal acquaintance. When he returned, Webster Parish Sheriff's deputies had arrived. They first dispatched Officer White to an automobile accident outside Cullen, while they took over his investigation, in his jurisdiction. (Rec., 215, Exhibit N). Officer Mendenhall waited for the deputies to interview him about the incident, but they ignored him, so he went home. Indeed, the deputies, who were all white, interviewed neither Mendenhall nor White, both black. As Officer White later deposed, "[t]hey treated me like I was nothing." (Rec., 215, Exhibit M, pages 37, 42).

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[5] Rec., page 274, Exhibit 4, pages 64, 65-68.

[6] Rec., page 215, Exhibit L, pages 69, 71; Exhibit P, pages 13-17.

Later that day, Officer Mendenhall went to the Springhill Police Department to talk to the deputies. He was Mirandized, answered questions about the shooting, and denied that he had shot Myles. Shocked when he realized that he was being treated as a criminal suspect, however, he refused to answer further questions until he had a lawyer and left. That evening, deputies obtained an arrest warrant for murder and Officer Mendenhall left his shift at the Haynesville Police Department early to turn himself in. (Defendants' Record Excerpts, tab 4; Rec., 215, Exhibits A, F, G).

Officer Mendenhall was subsequently absolved when Ted Nellams acknowledged shooting Myles, and the trial judge found no probable cause to hold Mendenhall at a preliminary examination. Subsequent ballistic tests revealed that the shell casings at the scene did not come from Mendenhall's gun and the District Attorney dismissed the charges. (Rec., 215, Exhibits B, C, D).

Mendenhall, who narrowly lost his bid for election as Cullen Police Chief as a result of his arrest, filed suit for false arrest under 42 U.S.C. § 1983. The defendants filed a motion for summary judgment on the basis of qualified immunity which U.S. District Judge Donald Walter denied. A divided panel of the U.S. Court of Appeals for the Fifth Circuit reversed. Mendenhall files this petition for writ of certiorari.

The District Court had jurisdiction of this case under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IMPERMISSIBLY DREW INFERENCES IN FAVOR OF THE MOVANTS, AND SUBSTITUTED ITSELF FOR THE JURY BY MAKING CREDIBILITY CALLS AND WEIGHING EVIDENCE, IN CONTRAVENTION OF THE PRINCIPLES RECENTLY REAFFIRMED IN *REEVES V. SANDERSON PLUMBING PRODUCTS*, ____ U.S. ____, 120 S. CT. 2097 (2000).

In *Reeves v. Sanderson Plumbing Products*, ___ U.S. ___, 120 S. Ct. 2097 (2000), this Court recently had occasion to remind the Fifth Circuit that a court may not substitute itself for the trier of fact. There, the Fifth Circuit erroneously set aside a jury verdict. Reversing, this Court repeated familiar guidelines for deciding a motion to take a case away from the jury:

> "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."

Id., at 2110 (internal quotations and citations omitted). Here, in the instant matter, the Fifth Circuit refused to let the case go to the jury. The Fifth Circuit panel decided the Mendenhall appeal before this Court issued its opinion in *Reeves*. Without

the benefit of *Reeves*, the Fifth Circuit overstepped its bounds and made the same mistake.

A. The Court of Appeals discounted evidence favorable to the non-movant by framing the issue as who shot Myles, rather than whether the shooting was justified.

At the threshold, the panel majority discounted strong, largely undisputed evidence favorable to the non-movant by the way it framed the issue. The majority focused on the identity of the shooter, rather than whether the shooting was justifiable. But the evidence overwhelmingly indicated that Officer Mendenhall would have been justified in shooting Myles (had he done so) to abate a mortal danger to civilians in the area. Myles had just kidnapped and shot Deion Grisby. He fled, randomly shooting at civilians as he ran. Children were in the street. Under those circumstances, an officer is allowed to use deadly force, see La. Rev. Stat. § 14.20; *Tennessee v. Garner*, 471 U.S. 1 (1985), and a reasonable deputy would not have rushed to arrest a fellow officer who did so. Had the majority framed the issue in this manner, it would necessarily have affirmed the denial of summary judgment.

The panel majority, however, dismissed the evidence indicating justifiable homicide in a footnote. 213 F.3d at 232 n.6. First, it asserted that Myles was shooting into the air. That evidence came from Pamela Neal, who later testified on deposition that Myles also was shooting at occupied cars. (Rec., 215, Exhibit P). The majority transgressed the *Reeves* guidelines by discrediting Neal's deposition testimony, as well as Mendenhall's to the same effect. Second, the Court concluded without explanation that its review of the record indicated that the officers behaved reasonably in pursuing the investigation as a homicide. The panel majority necessarily weighed the evidence to reach that conclusion. There is no

dispute that Myles had just kidnapped and shot Grisby. There is no dispute that Myles was firing a gun as he tried to escape. There is no dispute that Mendenhall, a police officer, had been asked by another police officer to assist in the apprehension of Myles. This undisputed evidence points to the justifiable use of deadly force in the line of duty. The Court must have weighed other evidence against this undisputed evidence to conclude that the deputies acted reasonably in making an arrest within 24 hours for murder. *Reeves* reserves this function for the jury.

B. The Court of Appeals consistently drew inferences adverse to the non-movant from the evidence on which it chose to rely.

The evidence on which the Court chose to rely[7] was plainly susceptible of at least two interpretations. Consistently, the majority selected the interpretation adverse to Mendenhall, the non-movant, in contravention of *Reeves*.

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[7] The Court of Appeals summarized the evidence on which it relied in finding that a reasonable officer had probable cause to arrest Officer Mendenhall for murder as a matter of law:

> "investigating deputies spoke with two witnesses who affirmatively identified Mendenhall as the shooter; another witness, Pamela Neal in her handwritten statement, placed Mendenhall at the scene with a weapon; medical personnel reported Mendenhall's uncanny knowledge of the wound and Mendenhall's eagerness to finger evidence relating to a homicide; investigating deputies obtained two spent nine millimeter shell casings from the scene, and later became aware that Mendenhall possessed such a caliber weapon; and Mendenhall refused to cooperate or answer questions concerning the killing."
>
> 213 F.3d at 236.

i). Deputy Ashley's mystery witnesses.

In his report, Deputy Ashley states that he spoke with two witnesses who said they saw Officer Mendenhall shoot Myles. There are several reasons that the jury could have chosen not to believe Deputy Ashley. First, he could not identify the witnesses, and they never came forward again. Second, as the dissent noted, on deposition Deputy Ashley backed off his report and clarified that the witnesses told him only that they had seen Officer Mendenhall "out there with a gun." 213 F.3d at 237, 237 n.2. The distinction is critical. In context, the latter is not even circumstantial evidence of murder. With a dangerous criminal on the loose, shooting at civilians, Officer Mendenhall naturally would have been "out there with a gun," regardless of whether he had shot Myles. Third, there was always a serious question for the jury as to the very existence of these unidentified witnesses. Significantly, Ashley's supervisor on the scene, Deputy Shaw, makes no mention of any such witnesses in his report, which was written a week after the shooting took place. (Rec., 215, Exhibit N). If such witnesses had actually existed, surely chief deputy Cropper would have mentioned them at the preliminary examination, when he was pressed for witnesses on cross examination. He did not. (Rec., 215, Exhibit D). This evidentiary record presents a jury question as to whether two witnesses told Deputy Ashley that they had seen Mendenhall shoot Myles, or do anything that, in context, would lead a reasonable officer to believe that Mendenhall had committed murder. The panel majority erred in taking the determination from the jury.

ii). Pamela Neal's statement.

As with Ashley's anonymous witnesses, Neal's statement that Mendenhall was on the scene with a weapon

adds nothing to the probable cause calculus. Myles had shot Grisby and fled. Officer White asked Officer Mendenhall to try to apprehend Myles. When Officer Mendenhall found him, Myles was shooting at innocent civilians in the street. It was Officer Mendenhall's duty to draw his weapon and try to stop Myles from shooting yet another person. The panel majority refused to draw an obvious inference favorable to the non-movant when it interpreted this evidence as probative of probable cause that Mendenhall had committed murder.

Also erroneously, the majority discounted Neal's deposition testimony that she never told the deputies that Mendenhall shot Myles but rather identified a man in a green car as the shooter. The Court of Appeals found her deposition testimony immaterial because a reasonable police officer would have given it little weight in light of her failure to mention the man in the green car in a contemporaneous written statement.[8] This is a thinly disguised credibility determination and weighing of evidence, contrary to *Reeves*. As the dissent noted, on summary judgment a court must consider the evidence in the light most favorable to the non-movant. 213 F.3d at 238. It cannot disregard favorable evidence under the guise that a reasonable officer would do so.

iii). Mendenhall's "uncanny knowledge" of the wound.

When paramedics arrived, Officer Mendenhall reported that Myles had been killed by a single shot to the back of the head. The panel majority goes out of its way to draw an adverse inference from this statement. As the deputies knew, Mendenhall was on the scene when Myles was shot. He saw the shooting, and was in a position to know how many shots

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[8] Opinion, Appendix A, page 21.

had been fired. He also saw the body after Myles had been shot. Myles was lying on his back, with blood oozing out of the back of his head. (Rec., 215, Exhibit D, page 16). There is nothing "uncanny" about Mendenhall concluding from his observations that Myles had been hit by a single shot to the back of his head.[9]

iv). Mendenhall's "eagerness" to finger homicide evidence.

After determining that Myles was dead, Officer Mendenhall checked Myles' firearm to see whether it contained live rounds. With a number of bystanders in the area, including children, he took this security precaution to make sure "no one else would come up and pick up the gun and maybe start shooting it again." (Rec., 274, Exhibit 6). Perhaps it would have been better police practice to use gloves when picking up the gun, but given the security concerns of the moment, a jury could have found Mendenhall's conduct unexceptionable. The panel majority, however, went out of its way to draw an inference adverse to the non-movant, characterizing this conduct as "tampering with the evidence," and describing Mendenhall, with absolutely no evidentiary basis, as "eager" to disturb the crime scene.

v). Two spent nine millimeter shell casings at the scene.

Deputies found two spent nine millimeter shell casings

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[9] Earlier in the opinion, the Court draws similar adverse and unfounded inferences against Mendenhall when it characterizes Officer White's appearance at the Grisby shooting in time to arrest two perpetrators "remarkable," and Officer Mendenhall's appearance "even more notable." A jury arguably might be justified in drawing such inferences, but not a court reviewing denial of summary judgment.

at the scene. While the Court of Appeals included the fact of these casings as a probable cause factor (see footnote 7, *supra*), a jury could easily have found their location exculpatory, since they were found on Lee Street, where Pamela Neal had told the deputies the "green car"[10] shooter had been, not where Mendenhall was on Boucher Street, still in his truck. (Rec., 215, Exhibit P). In any case, *Reeves* reserves any inference here for the jury.

vi). Mendenhall "refused" to cooperate or answer questions.

After the paramedics arrived and Officer White reached the scene, Mendenhall obtained White's permission to go to the hospital to check on Grisby's condition. He returned to the scene soon after, but the deputies ignored him. This kind of treatment from the white deputies was nothing new; indeed, when the deputies first arrived, they sent White off to handle a traffic accident out of his jurisdiction. The jury could have drawn an inference that Mendenhall was piqued by the disrespectful way that he was treated, but the Court of Appeals drew the inference that he was trying to hide something.

Later, Mendenhall went to the Springhill Police Department to talk to deputies. They Mirandized and interrogated him. At first, he answered questions, including that he had not shot Myles. Then, as the questioning continued, it became apparent to Mendenhall that the deputies had targeted him for murder, and he said he wanted to confer with counsel. The panel majority faults Mendenhall for not volunteering what he had seen. Mendenhall insists he was never asked. (Rec., 215, Exhibit L, pages 241-43). A jury easily could have concluded that the deputies were not seeking information from

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[10] See page 13, *supra*.

a fellow officer but rather trying to build a murder case against him. Under those circumstances, Mendenhall's decision to seek counsel was perfectly legitimate. As *Reeves* instructs, the lower Court's decision to draw an adverse inference is improper.

vii). Summary

The summary judgment record amply presents a jury question as to whether a reasonable law enforcement officer would have believed that Officer Mendenhall was lawfully performing his duties when Myles was killed. The panel majority ignores this record and instead focuses on sketchy and disputed evidence that Mendenhall may have been the shooter, repeatedly drawing inferences from that evidence adverse to Officer Mendenhall. In so doing, the panel majority transgressed the boundaries reaffirmed by this Court in *Reeves* and usurped the role of the jury.

II. THE COURT OF APPEALS ERRED IN CONSIDERING MENDENHALL'S POST-*MIRANDA* SILENCE AS GROUNDS FOR PROBABLE CAUSE.

Before questioning Officer Mendenhall at the Springhill Police Department, the deputies gave him *Miranda* warnings. The panel majority erred in considering Mendenhall's subsequent invocation of those rights in the probable cause calculus.

This Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), not to allow impeachment on the basis of a defendant's silence after receiving *Miranda* warnings rested on two grounds. First, the Court found such silence "insolubly ambiguous" because it might "be nothing more than the

arrestee's exercise of these Miranda rights." *Id.*, at 617. Second, the Court considered it fundamentally unfair to tell a suspect that he could remain silent and then to use his resultant silence against him. *Id.*, at 618. Accordingly, it held impeachment at trial by post-*Miranda* silence violative of due process.

The same reasoning applies to use of a suspect's post-*Miranda* silence in the probable cause calculus. In the absence of *Miranda* warnings, an officer may consider a suspect's refusal to answer questions in deciding whether to make an arrest. But the articulation of the *Miranda* warnings prior to questioning vitiates any inference of guilt that would otherwise arise from silence. Wayne R. LaFave, 2 Search and Seizure, § 3.6(f) at 330-32 (1996). Furthermore, it is unfair to tell a suspect that he may remain silent, and then to draw adverse inferences from his decision to avail himself of the option. A reasonable officer would know that *Doyle* prohibits use of post-*Miranda* silence and would not have considered Mendenhall's invocation of his *Miranda* rights in the probable cause calculus. The panel majority erred in doing so itself.

III. THE COURT OF APPEALS DISREGARDED THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*, ____ U.S. ____, 120 S. CT. 1495 (2000), BY FRAMING THE QUALIFIED IMMUNITY INQUIRY AS WHETHER "THE FACTS . . . SUPPORT A FINDING THAT *NO REASONABLE OFFICER* COULD HAVE BELIEVED PROBABLE CAUSE EXISTED. . . ."

The Court of Appeals mistakenly framed the qualified immunity inquiry as:

"In essence, we must determine whether the facts,

> viewed in the light most favorable to Mendenhall, support a finding that *no reasonable officer* could have believed probable cause existed to arrest Mendenhall on charges of second degree murder in the shooting death of William Myles."

213 F.3d at 231 (emphasis added).[11] This formulation is error. The Court should have asked "whether a reasonable officer could have believed" the challenged conduct lawful in light of clearly established law and the information the officer possessed. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The Fifth Circuit's formulation is wrong for two reasons. First, it puts the burden of proof on the plaintiff, whereas qualified immunity is an affirmative defense that must be proven by the defendant. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982). Second, it assigns plaintiff the nearly impossible task of proving that not a single reasonable officer could have found probable cause, whereas the test formulated by this Court is one of objective reasonableness.

This Court rejected a similar formulation in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), decided barely six weeks before the Court of Appeals issued its opinion in the instant case. *Williams* involved the recently enacted limitation of habeas relief embodied in 28 U.S.C. § 2254(d)(1), prohibiting grant of the writ with respect to claims decided on their merits in State court proceedings "unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." The entire Court disagreed with the Fourth Circuit's interpretation of "unreasonable application" as an application "reasonable jurists all would agree is unreasonable." *Id.*, at

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[11] The Fifth Circuit used the same erroneous formulation in *Babb v. Dorman*, 33 F.3d 472, 477-78 (5th Cir. 1994).

1505 (opinion of Justice Stevens); *Id.*, at 1521-22 (opinion of Justice O'Connor). Writing for the Court, Justice O'Connor explained:

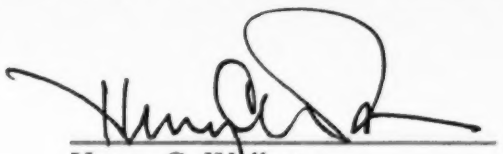
> "Defining an "unreasonable application" by reference to a "reasonable jurist," however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one."

Id., at 1521-22. Justice O'Connor expressly noted that "[f]or example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner." *Id.*, at 1522. The panel majority articulated and applied a similarly erroneous standard in the instant case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue, and upon review of the Fifth Circuit's pre-*Reeves* opinion, this Court is asked to either dispose of the matter by summarily reversing that decision in light of *Reeves*, so that a jury may decide the matter, or remand with appropriate *Reeves*

instructions, and instructions regarding post-*Miranda* silence.



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APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30158

JOHN MENDENHALL,

Plaintiff-Appellee,

versus

THEODORE RISER, JR., individually and in his official capacity as Sheriff of Webster Parish;
STEVE CROPPER, individually and in his official capacity as Webster Parish Deputy Sheriff;
JAMES BELL, individually and in his official capacity as Webster Parish Deputy Sheriff;
ALVA NULL, individually and in his official capacity as Webster Parish Deputy Sheriff;
WAYNE NEWTON, individually and in his official capacity as Webster Deputy Sheriff,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed May 30, 2000)

Before JOLLY, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.
BENAVIDES, Circuit Judge:

Appellants appeal from the district court's order denying their Motion for Summary Judgement, seeking dismissal of appellee John Mendenhall's § 1983 civil rights complaint on the basis of qualified immunity. Because we determine that the officers acted reasonably in arresting John Mendenhall for the crime of murder, we reverse the district court and grant appellants qualified immunity on all claims asserted by Mendenhall.

I. FACTUAL AND PROCEDURAL BACKGROUND

On a fateful Friday the Thirteenth in September of 1996, William Myles attempted to rob Deon Grisby in Cullen, Louisiana. Early that morning, sometime around 7 a.m., Myles and several purported members of a drug gang accosted Grisby while he was inside his girlfriend's home, in what is presumed by all parties involved to be a drug-related transaction. When Grisby refused to turn over a sum of money on demand, Myles and his cohorts forced Grisby into the car they were driving. As they began to drive off, however, Grisby attempted to escape by leaping from the moving vehicle. His efforts to flee were met with gunfire. He was shot several times, as the would-be kidnappers took flight.

The exact sequence of these chaotic events is unclear, but somehow, perhaps in response to a call for help, Cullen Police Officer Jimmy Wayne White, appellee Mendenhall's half brother, arrived shortly thereafter, in time, remarkably, to apprehend two of the renegade gang. Due to this fortuitous arrival of the cavalry, Grisby was rushed to the hospital and

his life was saved. Myles, in the meantime, escaped on foot, in the direction of Lee street.

Perhaps even more notable than his brother's timely appearance at the scene of this shooting, John Mendenhall also arrived moments later, dressed in his police officer's uniform, apparently on his way home from work.[1] Upon consultation with Officer White, Mendenhall gave chase to Myles.

Mendenhall was not the only individual in pursuit early that morning. Several other individuals led a small procession in the chase after Myles. Mendenhall, driving his red pickup truck, fell in behind them.

It is at this juncture that the exact sequence of events is somewhat unclear from the record. Nonetheless, one indisputable event occurred: Near the corner of Lee Street and Boucher Extension, Myles was killed instantly from a single gunshot wound to the back of the head by someone in the group that gave chase. It is the events subsequent to this shooting that give rise to this appeal.

Medical personnel arrived on the scene shortly after Myles was shot, followed by Officer White accompanying Deputy Shaw and Deputy Ashley. Sometime shortly

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[1] John Mendenhall served as a deputy sheriff in Webster Parish for several years prior to the events that give rise to this dispute. His tenure apparently ended upon the swearing in of appellant Sheriff Riser in June of 1996. Sheriff Riser, as he stated in depositions taken in relation. to this lawsuit, apparently dismissed Mendenhall out of concern for his criminal record. Following his dismissal in Webster Parish, Mendenhall secured employment as a police officer in Haynesville, in neighboring Claiborne Parish, although he maintained his residence in Cullen, Webster Parish.

thereafter, Mendenhall simply left the scene. Deputies Cropper and Null, both appellants in this matter, were notified and dispatched to the scene as lead investigators. Upon their arrival, they began in earnest the investigation of the presumed homicide.

The investigators' focus soon shifted to Mendenhall, as two witnesses at the scene identified him as the shooter. In an effort to obtain his statement, appellant Deputy Newton visited Mendenhall at his home, requesting that he return to the Webster Parish Sheriff's office sub-station in Springhill. While it does not appear that Mendenhall immediately complied with this request, he did later make an appearance at the sub-station. He was greeted by appellant-deputies Steve Cropper, Alva Null, Jim Bell, and Wayne Newton. The deputies mirandized Mendenhall, and then proceeded to inquire as to the day's events. Mendenhall, however, refused to cooperate. He left the station shortly after arriving, and apparently reported to duty with the Haynesville Police Department.

Considering the information gathered from the day's investigation,[2] Deputy Cropper prepared a complaint-

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[2] The dissent expresses confusion concerning the nature and extent of the ensuing investigation, implying'. in fact, that little investigation occurred at all. our reading of the record reveals an extensive investigation on the day of the murder, including: an on scene investigation of the crime, involving a full canvass of the neighborhood for any potential witnesses; further investigation at the hospital, where the victim of the first shooting was recovering; the questioning of witnesses identified at the hospital; follow-up investigation of the murder weapon, in an effort to determine whether Mendenhall owned a similar caliber weapon; later investigation at the scene, including follow-up interviews with eyewitnesses; a visit to Mendenhall's home, at which time his cooperation was requested; and an attempted interview with Mendenhall at the station house.

affidavit for the arrest of John Mendenhall on charges of second degree murder in violation of Louisiana law.[3] Using this affidavit, and another prepared for the purpose of obtaining a search warrant, Cropper sought and obtained a warrant for the arrest of John Mendenhall, as well as a search warrant for his home. Upon issue, the arrest warrant was faxed to Mendenhall's place of employment, at which time he was stripped of his weapon and badge and placed into custody. Upon being processed into the system, Mendenhall was locked in the Webster Parish jail, where he spent one night, before being released on bond the next day.

Upon release, Mendenhall sought and secured counsel. A Motion for Expedited Preliminary Examination was filed on September 16 - a Monday - and the hearing was scheduled for the following Monday. Mendenhall requested the expedited hearing out of concern for his candidacy in the upcoming election for Cullen Police Chief, to be held the following Saturday. He was naturally worried about the impact of a pending murder trial on his chances in the election. His concern may have been well founded, as Mendenhall subsequently lost the election.

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[3] Officer Cropper's affidavit in support of the arrest warrant stated in relevant part:

> [To the best of my knowledge and belief], John Mendenhall ... did commit in the following manner an offense contrary to law by chasing a black/male by the name of William D. Myles, down Lee St. Cullen, Louisiana, armed with a 9mm piston, then firing the 9mm piston, striking William D. Miles in the back of the head, causing death. After shooting William D. Myles put [sic] the 9mm pistol back into his vehicle, then leave [sic] the scene, before talking to Investigating officers. John Mendenhall had specific intent to inflict bodily harm. Therefore violating LRS 14:30.1 Second Degree Murder.

At the hearing, Deputy Cropper testified as to the facts and circumstances supporting probable cause. Mendenhall, in his defense, presented the affidavit of Ted Nellams, an individual indisputably at the scene of Myles' shooting, who claimed to have fired the fatal bullet. The presiding judge, considering Nellams' affidavit, failed to find probable cause to bind Mendenhall over for trial as required under Louisiana law.[4] The district attorney subsequently dismissed the prosecution against Mendenhall.

Mendenhall filed suit pursuant to 42 U.S.C. § 1983 nearly one year later, asserting that appellants violated his civil rights by falsely arresting him for the murder of William Myles. Each side respectively filed motions for summary judgment. Finding that "genuine issues of material fact remain in this matter" with respect to the claims made by each party, the district court denied summary judgment to all. Appellants filed a timely notice of appeal concerning the failure of the district court to grant summary judgement on qualified immunity grounds.

II. DISCUSSION

A. Jurisdiction and Standard of Review

While no party contests our jurisdiction to hear this interlocutory appeal, we write briefly to note that, although denials of qualified immunity on summary judgment are not final orders, they are immediately appealable under the collateral order doctrine if based on an issue of law. See *Rodriguez v. Neeley*, 169 F.3d 220, 222 (5th Cir. 1999) (citing *Cantu v. Rocha*, 77 F.3d 795, 802 (5th Cir. 1996); *Mitchell v.*

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[4] LSA-C.Cr.P. Art.296.

Forsyth, 472 U.S. 511, 526 (1985)).

When as here the district court fails to make specific findings of fact or state specific conclusions of law, we will "undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). In essence, we will give the plaintiff the benefit of the doubt with regard to any disputed issues of fact, in an attempt to reconstruct the district court's findings and conclusions, and thus review as a matter of law whether under such a factual scenario the §1983 complaint may proceed. See *Colston v. Barnhart*, 130 F.3d 96, 98-99 (5th Cir. 1997). If those facts do not materially affect the outcome - i.e., if even under such a factual scenario the officers' actions may be deemed as a matter of law objectively reasonable - the denial of summary judgment is immediately reveiwable as a question of law, and qualified immunity should be granted. See *Id.* (citing *Mitchell*, 472 U.S. 511 (1985); *Johnson v. Jones*, 515 U.S. 304 (1995); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 (5th Cir. 1996)).

Our review of the district court's order denying summary judgment on qualified immunity grounds is conducted *de novo*. See *Nerren*, 86 F.3d at 472 (citing *Johnson v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994)).

B. Probable Cause and Objective Reasonableness

It is, by now, well settled and understood that "[f]ederal immunity law shields state officials from personal liability under federal law for civil damages as long as their conduct could reasonably have been thought consistent with

the rights they are alleged to have violated." *Cantu*, 77 F.3d at 805 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). Qualified immunity protects against novel theories of statutory or Constitutional injury - any purported harm must stem from rights clearly established under law at the time of the incident, and the contours of that right must be sufficiently clear such that a reasonable officer would understand that his actions were violative of the right at issue. See *Anderson*, 483 U.S. at 638 - 39. Thus, the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986).

When an individual asserts a claim for wrongful arrest, qualified immunity will shield the defendant officers from suit if "'a reasonable officer could have believed [the arrest at issue] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson*, 483 U.S. at 641); see also *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). "Thus, a qualified immunity defense cannot succeed where it is obvious that a reasonably competent officer would find no probable cause. On the other hand, 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Babb*, 33 F.3d at 477 (quoting *Malley*, 475 U.S. at 341).

Thus armed, we turn to the facts of the case now before us. In essence, we must determine whether the facts, viewed in the light most favorable to Mendenhall, support a

finding that no reasonable officer could have believed probable cause existed to arrest Mendenhall on charges of second degree murder in the shooting death of William Myles. We note that our determination concerning probable cause is guided by the Supreme Court's mandate in *Illinois v. Gates*: We look to the totality of the circumstances to determine whether probable cause, or in this case arguable probable cause, existed. 462 U.S. 213, 241 (1983). We are mindful of the notion that "probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Thus we embark on a "practical, common-sense [determination] whether given all of the circumstances" a reasonable officer could have believed "there is a fair probability" Mendenhall committed the crime charged. *Id.* at 238.[5]

Appellee repeatedly draws our attention to the Preliminary Examination, conducted some 10 days after his arrest, in an effort to demonstrate the purported lack of probable cause in this case. While we recognize that the state judge failed to find probable cause at the Preliminary Examination hearing, we reject the notion that this finding bears any relevance to our task in resolving this appeal. The law charges us with determining the reasonableness of the actions taken in light of the cause that existed *at the time of arrest*. See *Hunter*, 502 U.S. at 228 (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) ("Whether [an] arrest [is] constitutionally valid depends in turn upon whether, *at the moment the arrest was made*, the officers had probable cause to make it -

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[5] We pause to note that we need not and in f act do not decide today whether probable cause on the facts of this case actually existed at the time of arrest.

whether at that moment the facts and circumstance within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.") (emphasis added).

Mendenhall further emphasizes in his brief that the timing of his arrest itself is suspect, and lends support to his suit. Specifically, he draws our attention to the election for police chief to be held approximately one week after he was arrested. In essence, Mendenhall contends that his arrest was executed with the intention of undermining his chances in the election.

We are compelled to note first that it defies logic to conclude appellants in this matter successfully orchestrated the shooting of Deon Grisby by William Myles, followed by a chaotic chase in which Mendenhall happened to participate, concluding in the shooting death of Myles in which Mendenhall was subsequently implicated, all out of motivation to defeat Mendenhall's chances at the polls.

However, regardless of logic, and even assuming the worst - i.e., the appellant-deputies seized upon a mystical confluence of events to accomplish their nefarious goal of defeating Mendenhall in the upcoming election - we are compelled by our case law that clearly dictates subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law. *Anderson*, 483 U.S. at 641 (citing *Harlow*, 457 U.S. at 815-20).

We proceed. Mendenhall was arrested pursuant to a valid arrest warrant secured by Deputy Cropper. Cropper

obtained the warrant relying on information learned by him and other investigating deputies over the course of the day of the murder. While a valid arrest warrant would normally insulate officers against a claim for false arrest, in a case such as the one before us where the officers charged with false arrest were responsible for securing the warrant, we are required to test the validity of that warrant, applying the usual standards. See *Malley*, 475 U.S. at 345-46.

The first and primary piece of evidence relied upon was the fact of the shooting itself. It is undisputed that Myles was killed by a single gun shot wound to the back of his head, indicating he was shot while fleeing the scene.[6]

Further information obtained from Wayne Walsh, the first emergency medical technician to arrive on the scene, pointed to Mendenhall as the prime suspect. Specifically, Walsh reported to investigating officers that Mendenhall, at the scene providing crowd control when the ambulance arrived, related that Myles was taken down by a "single head shot," in response to inquiries concerning the circumstances of the shooting. This fact was not immediately evident, as Myles was lying face up in the road.[7] Mendenhall related

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[6] Cropper, the lead investigating officer, concluded from this information that a crime had been committed, rather than a justifiable homicide in self-defense or in the line-of-duty. Mendenhall asserts that the shooting of Myles was, in fact, justified, as Myles was fleeing from a botched kidnaping in which another was shot and left for dead, and as he fled, he apparently fired his weapon into the air. Our independent review of the record indicates that on the day of the shooting the officers behaved reasonably in pursing the investigation as an inquiry into a suspected homicide.

[7] In fact, Wayne Walsh, a trained emergency medical technician, could not determine the nature of the injury until the body was "rolled."

first-hand information through the revelation of this fact. Further investigation proved Mendenhall correct.

Walsh further reported that Mendenhall tampered with evidence at the scene. Specifically, Walsh reported witnessing Mendenhall pick up a silver revolver that was lying at the feet of the victim, unchamber the rounds of ammunition in the weapon, examine them, replace them in the chamber, and then place the weapon back on the ground in essentially the same position in which it was originally found.[8]

This foregoing information was obtained without the benefit of John Mendenhall, as shortly before investigating

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[8] While the dissent asserts that "the summary judgment record does not establish that, as a police officer faced with stressful, violent and chaotic circumstances, Mendenhall's conduct was unusual, let alone suspicious," our reading of Mendenhall's own deposition testimony supports the alternative position that even Mendenhall knew his behavior was anything but standard:

Q: Had anybody moved the body at this point?
M: No. The body was never moved.
Q: Why not? Why didn't somebody move the body to see where he was wounded?
M: They didn't want to touch him.
Q: Why no?
M: Like I said, I thought we was making enough boo-boo's as it is. Why, you know, you're not supposed to touch him until the coroner get there. That's one thing I do know.
Q: Now, you acknowledge that you made some errors in picking up the gun and checking the empty shells?
M: Yes, sir.
Q: And that you probably should have, on second thought, not given Ted the ability to leave?
M: Yes, second thought, yeah.

officers Cropper and Null arrived at the scene, Mendenhall simply left, without offering any statement concerning the events of the day.[9] His sudden absence from the scene of a homicide, without any explanation, warranted further inquiry in the minds of lead investigators.

When investigating officers began to inquire of the officers on the scene as to the morning's events, Deputy Ashley reported speaking with two witnesses.[10] It appears that Ashley, being one of the first officers to arrive after the shooting, began a canvass of the immediate area in an attempt to obtain witness statements and any other relevant evidence. In so doing, he spoke with two witnesses who refused to give their names, but who affirmatively identified Mendenhall as the shooter.[11]

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[9] The dissent reads this fact 'as reflecting poorly on the officers, investigative skills; essentially as a failure on the part of investigators to obtain Mendenhall's version of events at the scene. However, our careful review of the record reveals that, in fact, Mendenhall departed while Ashley was securing the area and speaking with witnesses and Shaw was on the phone seeking assistance from superior officers. Mendenhall, thus, left the scene before officers had an opportunity to question him. Despite the dissent's insinuation that Mendenhall had no reason to cooperate, he was not, at this time, a suspect. It was his voluntary, premature exit from the scene, before he could even be asked about the day's events, that led investigators to first question his role in Myles' shooting death.

[10] It should be noted Deputy Ashley is not a party-defendant to this lawsuit.

[11] The dissent maintains that Deputy Ashley's testimony actually reveals that neither witness ever said they saw Mendenhall shoot. A closer and more complete reading of Ashley's testimony, however, reveals that he was only trying to clarify those witness, statements, not withdraw his testimony that they had identified Mendenhall:

Q: Okay. That they didn't actually see him shoot, but he was

out there with a gun?
A: Correct.
Q: Okay.
A: Didn't actually see him pull the trigger.
- - - -
Q: But, the essential stuff that they saw the guy get shot, John was the only guy they saw with a gun in his hand . . .
A: Chasing him.
Q: . . . but, that they didn't see him shoot the guy?
R: Actually pull the trigger.
Q: Right.
A: Correct.

Thus, the dissent's efforts to impeach Ashley by implying that he withdraws his testimony concerning the two witnesses is not borne out by the record. Rather, Ashley simply clarified his testimony, under questioning, to be clear that the witnesses never actually saw Mendenhall pull the trigger - understandable, given the frightening nature of the scene witnessed. This in no way undermines the reliability of the report he produced immediately following his investigation, in which he stated that "two of [the witnesses] said that John Mendenhall had shot the deceased in the head." In fact, the dissent's general attempt to discredit this report and subsequent testimony is undermined by the very fact that Ashley filed his written report, complete with references to these witnesses, on the day of the incident and testified consistent with this report in his deposition testimony taken months later, in conjunction with this lawsuit.

Further, the dissent's additional attempt to discredit Ashley's report of these two witnesses by referencing ten witnesses supposedly interviewed by Cropper at the scene of the crime, who were supposedly unable to testify that Mendenhall shot Myles, is factually incorrect and misstates the record. In the first instance, Cropper testified that he did not, in fact, successfully interview witnesses at the scene. Rather, Ashley and Null canvassed the area, while Cropper's minor efforts to speak with local residents were generally met with resistance. Thus, when Cropper referenced ten witnesses to these events during the Preliminary Examination, he was referring to witnesses generally, not simply eyewitnesses to the shooting. His deposition testimony further reveals that some of them were, in fact, interviewed after the arrest (thus, they are not: relevant to the matter before this Court today.) Further, two of the ten witnesses mentioned by the dissent and referred to

Somewhat later in the day, at the hospital where Grisby was receiving treatment, Ashley overheard what would be the third witness he reported identify Mendenhall as the shooter. Deputy Cropper received this reported identification not only from Ashley, but also from Deputy Newton, who while present at the hospital complied with Ashley's request to question the woman. Newton was selected, apparently, as he was more familiar with the residents in the relevant neighborhood. When Newton questioned this witness, whom he identified as Pamela Neal, as to the events she observed that morning, Newton reported, consistent with Ashley's report, that Neal identified Mendenhall as the shooter.

In an attempt to follow-up with Pamela Neal, who is also Deon Grisby's half-sister, deputies went to the home she shared with her Mother, Gertie, located at the scene of the shooting, approximately sixty feet from where Myles body lay in the street. Officer Jimmy Morgan, assisting with the investigation, accompanied Deputy Null to the Neals' home that afternoon.[12] He questioned the Neals as to the events

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by Cropper as supporting probable cause were, in fact, the two witnesses interviewed and reported by Ashley. Thus, the dissent's assertion that "Cropper, who arrived soon after Ashley, interviewed approximately ten witnesses, all of whom apparently provided him their names," does nothing to undermine Ashley's report that the witnesses were reluctant to cooperate, as, in fact, it misstates the record and Cropper's role in interviewing witnesses.

[12] Appellee Mendenhall attempts to argue in his brief that Null met with Neal on two separate occasions on the day of Myles' shooting, and that this is somehow relevant to the outcome of this appeal. Specifically, appellee urges us to consider Null's purported deception in denying meeting with Neal a second time. Our review of the record indicates, however, that

they witnessed earlier that day. He maintains that Gertie and her daughter both reported seeing Myles running down the street, weapon in hand, followed by John Mendenhall, also bearing arms. They then reported hearing shots fired, and when they looked next, having apparently ducked in fear, they saw Myles fall to the ground. They further observed Mendenhall, weapon in hand, either standing somewhere near the slain body or near his vehicle. It was obvious at that time that Myles fell victim to the gunfire they had just heard. The Neals further stated no one else with a weapon was anywhere in the area. Sometime during this visit, Pamela Neal executed a written statement as to the day's events.[13]

In deposition testimony concerning these events, Pamela Neal asserts that she never, in fact, identified John Mendenhall as the shooter, and she asserts her mother did not witness events nor answer questions concerning these events,

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Null and Neal met only once on September 13, 1996. While Null and Neal appear to differ somewhat as to the time of this meeting - Neal remembers the meeting occurring in the afternoon, while Null is less clear as to the time - there is no summary judgment evidence that this second meeting ever took place. Any argument offered by appellee concerning why certain questions were not asked by Null at this second meeting, therefore, cannot be considered by this Court, as there was no second meeting at which Null could have engaged in this inquiry.

[13] Deputy Null apparently requested Pamela Neal's statement concerning the events of that morning. In response to this inquiry, Neal wrote and acknowledged the following statement: "Around 7:30 this morning I looked out of my front door. A man was running down the street with a gun in his hand and shooting up in the air. John Mendenhall was up the street in his truck. The man ran passed [sic] John, and John yelled at him to stop. The man jumped a ditch turned around shot up in the air. I ducked. When I looked up the man was hitting the ground. And John was standing by his truck with a gun in his hand."

as the deputies maintain.[14] Specifically, she recalls discussing the day's events with Deputy Newton at the hospital, and specifically recalls informing Newton that another man - not Mendenhall - who apparently was driving a green car, shot Myles. She claims, in her deposition testimony, that she was unaware of this individual's identity at that time, and did not provide a name to Newton.[15] In fact, she denies ever identifying Mendenhall as the shooter, thus disputing Ashley's claim of overhearing her make just such a statement. We address the consequences of this factual dispute below.

Further evidence gathered that day concerning the suspected murder weapon. Specifically, officers at the scene recovered two spent nine-millimeter shell casings, despite finding no nine-millimeter weapon anywhere near the body. Inquiry by Deputy Null into whether Mendenhall possessed a weapon of that caliber revealed that Officer Todd Moore previously performed some repair work on a Tec-9 handgun, a nine-millimeter weapon, that belonged to John Mendenhall.

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[14] Pamela Neal states in her deposition that her mother only witnessed Myles falling to the ground. Her mother confirms this version of events in her deposition testimony, to the effect that upon hearing gunfire, and rushing to the door, she witnessed the victim falling to the ground, and nothing further. She further confirms that her daughter, in speaking to Deputy Null that afternoon at their home, did not identify Mendenhall as the shooter, although it is difficult to gauge from her testimony the extent of her knowledge of the exchange between her daughter and Null.

[15] It should be noted that Neal admits in her deposition testimony that she was aware of the identification of this man - Ted Nellams - but, as she was dating Nellams at the time of the incident, she asserts she identified him only by virtue of the automobile he was then driving, out of fear of the police.

In an attempt to obtain Mendenhall's version of events, Deputy Newton paid a visit to Mendenhall, at his residence. In response to inquires as to the day's events, Mendenhall reported to Newton that he came upon Officer White at the scene of Grisby's shooting and subsequently left in pursuit of the shooter. He said he chambered a round in his handgun - not his nine-millimeter weapon but a smaller caliber handgun he carried but it jammed. He then refused further comment. Newton alerted Mendenhall that Cropper and Null, the investigating officers, wished to discuss the matter directly with him, and that he should report to the police station with all his weapons. Mendenhall apparently replied that he might make an appearance.

Later that day, Mendenhall did report to the station house. Prior to initiating the inquiry, Cropper read, and requested Mendenhall acknowledge by initialing, his *Miranda*[16] rights. Cropper then proceeded to question Mendenhall concerning the shooting, beginning with questions as to whether Mendenhall possessed a nine-millimeter weapon. Mendenhall apparently answered those initial questions, but as soon as the interview focused more intently on the morning's events, Mendenhall refused to provide additional information. Mendenhall maintains that his silence came in response to, and out of shock at, having been read his rights. He did nothing more, he now claims, than assert those rights as he understood them.

We pause in our factual recitation to quickly note that Mendenhall's purported motivation in refusing to answer questions is irrelevant. The indisputable fact, for summary judgment purposes, is his refusal and his subsequent

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[16] *Miranda v. Arizona*, 384 U.S. 436 (1966).

departure from the station house shortly thereafter.[17]

Deputy Null followed Mendenhall, in an attempt to convince Mendenhall to talk. Mendenhall refused, saying only that if the deputies could exercise patience until Monday, he would provide them with all relevant evidence concerning the shooting.

After this failed attempt to secure Mendenhall's cooperation, Deputy Cropper sought and obtained the arrest and search warrants.[18] Mendenhall was arrested later that

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[17] The dissent describes the failure of investigators to obtain Mendenhall and Officer white's version of events as the biggest missing piece in the probable cause puzzle. However, both men were interviewed and presented with ample opportunity - at the scene, and later - to provide their understanding of the day's events. Mendenhall himself testified that he allowed Ted Nellams to leave the scene of the crime because he planned to remain behind, in order to relate the manner of the shooting to investigators something he then failed to do.

[18] The dissent acknowledges that the officers were justified in seeking a search warrant for Mendenhall's nine-millimeter pistol, but posits that they should have done so first, prior to arrest, in order to conduct ballistics tests. While professional courtesy, as we imagine is extended from one officer to the next, might point towards this approach, the officers were by no means required under the law to search first and arrest later. In fact, as the officers' testimony reveals, there was concern that evidence was being lost as every moment passed.

The law requires that the officers, in order to arrest, must have probable cause just as they would need in order to search. In this case, the requisite probable cause appears to be coterminous. Simply stated, a warrant to search for Mendenhall's gun would have required probable cause to believe that the weapon to be searched for was evidence of a crime. The only applicable crime on these facts is murder. Our case law, following the Supreme Court, makes clear that probable cause to search is no different than probable cause to arrest. See *United States v. Brouillette*, 478 F.2d 1171, 1177 (5th Cir. 1973) ("It is well recognized that the probable cause required to justify a search warrant is coextensive with the probable cause

evening.

Upon careful consideration of the above facts, and after an exhaustive review of the summary judgment record in this case, we find, as a matter of law, that a reasonable officer in Deputy Cropper's position could believe probable cause existed to arrest Mendenhall for the murder of William Myles. Even after drawing all available inferences in Mendenhall's favor, we are compelled by the facts to so hold.

Our exhaustive review of the record reveals one significant dispute with respect to the relevant facts: the identification provided by Pamela Neal. As we must, we view this factual dispute in the light most favorable to Mendenhall. The dispute can be briefly summarized: Ashley maintains that he overheard Neal identify Mendenhall as the shooter; Newton, Null and Morgan maintain that Neal made the same identification in response to inquiries; Neal maintains that she identified a different man.

Even if Neal is correct, and Null and Newton now

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required to justify an arrest warrant.") The dissent states: "[T]wo spent nine-millimeter shell casings were found at the scene and . . . Mendenhall was thought to have had a nine millimeter pistol. This information would have justified the officers in seeking a search warrant for Mendenhall's pistol." Certainly the dissent does not mean to imply that probable cause exits on these facts to search the home of every individual in the community known to possess a nine-millimeter weapon. The only conclusion to be drawn from this statement is that the presence of the shell casings, *coupled with Mendenhall's actions that morning*, gave the officers probable cause. We simply fail to see how the officers could have had probable cause to search for a suspected murder weapon owned by Mendenhall, as the dissent maintains, but not probable cause to arrest Mendenhal' for murder, under the unique facts of this case.

mis-state her identification, we find this dispute to be immaterial to the inquiry now before us - whether a reasonable officer could have believed probable cause existed to arrest Mendenhall.

As we emphasized earlier, probable cause analysis requires us to look to the totality of the circumstances to determine whether the officers in this case behaved reasonably. Neal executed a handwritten statement placing Mendenhall at the scene with a weapon. Her statement made no indication of another as responsible for the shooting death of Myles. In fact, her statement omits entirely any reference to another party at the scene with a weapon. Even if, as she asserts, she informed Newton, in response to questioning, that the man in the green car committed the shooting, and even if she later repeated this statement to Null and Morgan, a reasonable officer - affording these statements appropriate weight in the probable cause analysis, reading them in conjunction with her handwritten statement which excluded any reference to this other man, and considering the totality of the remaining evidence pointing to Mendenhall as the shooter - could still conclude probable cause to arrest existed.

The undisputed facts, simply summarized, and disregarding the controversial identification from Pamela Neal, are: investigating deputies spoke with two witnesses who affirmatively identified Mendenhall as the shooter; another witness, Pamela Neal in her handwritten statement, placed Mendenhall at the scene with a weapon; medical personnel reported Mendenhall's uncanny knowledge of the wound and Mendenhall's eagerness to finger evidence relating to a homicide; investigating deputies obtained two spent nine-millimeter shell casings from the scene, and later became aware that Mendenhall possessed such a caliber

weapon; and Mendenhall refused to cooperate or answer questions concerning the killing. Under such a factual scenario, we simply cannot conclude that it was unreasonable for an officer to believe he had probable cause to arrest John Mendenhall.[19]

III. CONCLUSION

Mendenhall was at the scene of a homicide, holding a weapon. He was identified as the shooter and was known to be in possession of a weapon that matched the suspected murder device. He fled the scene when investigators arrived, and he subsequently refused to answer questions. His arrest was reasonable, as it was based on arguable probable cause and a civil action for damages under § 1983 cannot be maintained on these facts. It matters not for the purposes of this analysis that a later hearing, aided by the confession of another individual, resulted in Mendenhall's release from custody and bail. "The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Hill v. California*, 401 U.S. 797 (1971)). As such, we REVERSE the order of the district court denying qualified immunity and REMAND to the district court for dismissal of the claims asserted by Mendenhall pursuant to 42 U.S.C. § 1983 and for such other proceedings that are not inconsistent with this opinion.

REVERSE and REMAND.

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[19] Because we find the officers in this case behaved reasonably, and are thus entitled to qualified immunity, we need not reach the argument advanced by appellants concerning the related offense doctrine.

EMILIO M. GARZA, Circuit Judge, dissenting:

I would affirm the district court. Much about this case is disputed. If the evidence is viewed in the light most favorable to the nonmovant, Mendenhall, there are material issues of fact precluding summary judgment.

Mendenhall raises two claims under § 1983, based on his false arrest for William Myles' murder. The first is that a reasonable officer would not have believed that probable cause existed to arrest him. See *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). The second is that the arresting officers knowingly or recklessly submitted a false and misleading affidavit to obtain his arrest warrant. See *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *Hale v. Fish*, 899 F.2d 390, 400-02 (5th Cir. 1990). Material fact issues remain as to both claims.

Mendenhall was arrested the day of Myles's shooting, September 13, 1996. While the investigation at the scene of the shooting appears to have been the basis for Mendenhall's murder arrest,[1] the eyewitness testimony that emerged did little to provide probable cause for that arrest. Deputy Ashley claims that two anonymous witnesses at the scene identified Mendenhall as the shooter. Specifically, his written report states that the two witnesses had "said that John Mendenhall

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[1] The majority notes that the "investigators' focus soon shifted to Mendenhall, as two witnesses identified him as the shooter." It is unclear what further investigation, other than the contested discussions with Pamela and Gertie Neal and with Mendenhall, preceded the seeking of the arrest warrant against
Mendenhall.

had shot the deceased in the head." However, in deposition Ashley admitted that neither witness even saw Mendenhall fire a weapon.[2] Deputy Cropper, who arrived soon after Ashley, interviewed approximately ten witnesses, all of whom apparently provided him their names.[3] Pressed in his deposition, Cropper, who actually prepared the arrest affidavits and obtained the warrant, admitted that prior to Mendenhall's arrest no witness had told him that Mendenhall had fired a gun, let alone shot Myles.[4]

The officers claim that Pamela Neal also identified Mendenhall as the shooter. In her deposition, Neal claims

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[2] When asked if the anonymous witnesses testified "[t]hat they didn't actually see him shoot, but he was out there with a gun," Ashley responded, "Correct."

The majority argues that Ashley's clarification is no way affects the credibility of his statement that the two witnesses said that Mendenhall had shot Myles in the head. The record speaks for itself I believe jury members might reasonably disagree, finding the explanation that the witnesses said that they saw only Mendenhall with a gun at the scene of the shooting to differ materially from the statement that the witnesses said they saw Mendenhall shoot Myles. More generally, the existence of a reasonable disagreement with regard to Ashley's testimony, among other material aspects of the record, itself indicates that summary judgment is inappropriate.

[3] It is difficult to believe that the officers could not obtain names from the only two eyewitnesses who "saw" Mendenhall shoot Myles, especially as Cropper obtained names from each of ten witnesses who did not see this, as well as written statements from Neal, Belinda Harris, and Dexter Turner. At the very least, the anonymous nature of Ashley's witnesses renders them less worthy of reliance.

[4] Cropper stated that Monica King was the only witness to tell him that Mendenhall had fired and Cropper did not interview King until after Mendenhall's arrest.

that she not only did not identify Mendenhall as the shooter, but that she informed the deputies that a man in a green car, not Mendenhall, shot Myles. The majority "disregard[s] the controversial identification" from Neal, but on summary judgment we are required to affirmatively consider the evidence in the light most favorable to Mendenhall. Neal's deposition testimony is not contradicted by her written statement, which does not identify Mendenhall as the shooter or even state that Mendenhall fired his gun. Therefore, viewing the evidence favorably to Mendenhall, we are required to credit Neal's testimony that she informed the officers that a man in a green car, not Mendenhall, shot Myles. While Neal's credibility may have been questionable, her statements would reasonably have pointed toward further investigation, prior to Mendenhall's arrest, into other possible suspects.[5]

Therefore, the summary judgment record suggests that the alleged eyewitness testimony pointing to Mendenhall as the shooter is extremely weak. The other information on which the majority relies to find that a reasonable officer could have found probable cause to arrest Mendenhall is, to me, equally underwhelming. It is reasonably explained by the undisputed fact that Mendenhall was a police officer on the scene pursuing a dangerous criminal at the behest of Cullen

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[5] The majority states that the dispute over Neal's testimony is immaterial. To the extent to which the majority concludes, even if we accept that Neal informed the officers that 1) Mendenhall was not the shooter, and 2) a man in a green car was the shooter, a reasonable officer nevertheless would have believed probable cause for Mendenhall's arrest existed, I disagree. The unreasonable shallowness of the investigation preceding Mendenhall's arrest is exacerbated if we assume, as I believe we must, that Neal pointed to another man. As it turned out, Neal's alleged statements were accurate: the man in the green car was Ted Nelams, the shooter.

Officer White.[6]

The officers did not have a suspected murder weapon in their possession at the time of Mendenhall's arrest. The majority notes that two spent nine-millimeter shell casings were found at the scene and that Mendenhall was thought to have had a nine-millimeter pistol. This information would have justified the officers in seeking a search warrant for Mendenhall's pistol.[7] However, the officers had not even

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[6] Two witnesses, Belinda Harris and Dexter Turner, gave statements to the investigating officers in which they affirmed that at least six shots were fired in the course of the pursuit of Myles. Echoing Neal, Turner added specifically that he saw Myles shooting a gun as he ran through the streets.

[7] The dissent claims that by acknowledging that the officers could reasonably have sought a search war-rant for Mendenhall's nine-millimeter pistol, I have acknowledged that they also acted reasonably in arresting Mendenhall for murder. I disagree.

To support the proposition that probable cause to search for Mendenhall's pistol and probable cause to arrest Mendenhall for murder are coterminous, the majority cites *United States v. Brouillette*, 478 F.2d 1171, 1178 (5111 Cir. 1973) ("It is well recognized that the probable cause required to justify a search wan-ant is coextensive with the probable cause required to justify an arrest warrant."). We have never repeated this statement or cited *Brouillette* for this proposition. Moreover, *Brouillette* is readily distinguishable. In *Brouillette*, we held that federal officers must, to obtain a search warrant for a suspected house of prostitution, show probable cause for believing that an offense had been committed. See *id.* at 1176-77. We held that the search warrant at issue was invalid for failure to show probable cause. See *id.* at 1177. To support that conclusion, we stated that no arrest warrant, for any crime, could have been obtained. See *id.*

Therefore, in *Brouillette* we did not find that the existence of probable cause for a search warrant of an item suspected of use in a crime established probable cause for an arrest warrant. Rather, we held the converse: that the absence of probable cause' for an arrest warrant, due to

the lack of a showing that a crime had occurred, indicated the absence of probable cause for a search warrant. See also *Giordenello v. United States*, 357 U.S. 480,485-86 (1958) (stating that the Fourth Amendment applies to both arrest and search warrants, and ultimately invalidating an arrest warrant for lack of probable cause) (cited in *Brouillette*).

Therefore, *Brouillette* does not establish that probable cause to search for Mendenhall's pistol was coterminous with probable cause to arrest Mendenhall for Myles' murder, and under the circumstances I believe the two were not coterminous. Probable cause for a search warrant does not require probable cause to arrest the person whose property is to be searched. See *United States v. Melvin*, 596 F.2d 492, 496 (1st Cir. 1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."). "[W]ith respect to a person who the police do indeed suspect but do not have probable cause to arrest, such a person's property may be searched upon probable cause to believe that fruits, instrumentalities, or evidence of crime are present, even though the products of the search may implicate him." *Melvin*, 596 F.2d at 496. In *Melvin*, the First Circuit found that there was probable cause to search Melvin's property for instrumentalities or evidence of a crime based on an affidavit providing a reasonable suspicion that Melvin had committed the crime, even though that affidavit did not provide probable cause to arrest Melvin. See *id.* at 496-97 (noting that a contrary holding would "render property searches ineffective as tools of criminal investigations in many cases"). See also *United States v. Rojas*, 671 F.2d 159, 165 (5th Cir. 1979) ("[T]he facts necessary to show probable cause to arrest are not necessarily the same as those required to show probable cause to search.") (citing *Melvin*).

In this case, as in *Melvin* and not *Brouillette*, it is clear that a shooting had occurred. Mendenhall had been placed at the scene with a gun. Mendenhall was suspected of having a nine-millimeter pistol and two nine-millimeter shell casings had been recovered at the scene. Obtaining and testing Mendenhall's weapon would have resolved the question of whether Mendenhall's weapon had been fired and, if it had, whether it was the weapon used in the shooting. *Cf. Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) (holding that government may search for "mere evidence" of a crime and that "in the case of 'mere evidence,'

obtained such a warrant at the time they obtained the arrest warrant for Mendenhall, let alone performed the requisite ballistics tests on the pistol.[8] The fact that Mendenhall, a policeman, was suspected of having a nine-millimeter did little to provide probable cause to arrest him for the murder of Myles.

The majority also notes that Mendenhall handled Myles's weapon at the crime scene. Mendenhall's uncontested testimony is that he picked up Myles's gun to make sure that there were no live rounds still in the gun. Mendenhall removed the shells from the gun and, seeing that there were no live bullets, rechambered the empty shell casings. The summary judgment record does not establish that, as a police officer faced with stressful, violent and chaotic circumstances,[9] Mendenhall's conduct was unusual,

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probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction"); *Rojas*, 671 F.2d at 165 ("[P]robable cause to search exists when facts warrant a reasonable person to believe that the objects sought in connection with a crime will be found.") (internal citation omitted).

[8] The search warrant was obtained at the same time as the arrest warrant for Mendenhall. J. Schuyler Marvin, the Webster Parish assistant district attorney assigned to the case, testified that his office was not consulted prior to the arrest and that he would have preferred that the ballistics results been sought before the arrest warrant was obtained. The ballistics report exonerating Mendenhall was ultimately obtained just after the expedited preliminary examination.

[9] Asked whether there were people milling about the crime scene, Wayne Walsh noted that "there were people all over" and that Mendenhall, the only policeman on the scene, was "providing crowd control."

let alone suspicious.[10] Therefore, a fact issue remains as to whether that conduct provided any cause for arresting him for Myles's murder.

Perhaps the biggest flaw in the officers' brief pre-arrest investigation was their failure to adequately examine Officer White. White and Mendenhall have provided consistent testimony as to the events at the crime scene. The appellants have not expressly claimed that this testimony is false; even if they had, on summary judgment, we are required to credit it. According to White and Mendenhall, White was the first police officer at the scene, Mendenhall the second. White sent Mendenhall to Lee Street to pursue Myles, while White completed the arrest of two suspects. When White subsequently arrived on Lee Street, Mendenhall told White that Ted Nelams shot Myles in self-defense. White gave Mendenhall permission to leave the scene, to check on Deon Grisby at the hospital.

Yet, while White apparently led the Webster Parish investigators to the scene of Myles' death, they did not ask White any questions about what had happened.[11] The investigators took over the crime scene and immediately dispatched White to investigate an auto accident. White

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[10] The majority notes that Mendenhall admitted to certain technical errors at the crime scene. There is evidence in the record, however, that these errors were not rare and that in other instances they gave rise to little concern, let alone suspicion of criminal activity on the part of the officer.

[11] Mendenhall later returned to the crime scene. Ashley and Deputy Shaw both stated that they saw him there. But no investigator talked to Mendenhall at the scene.

complied, albeit unhappily.[12] Later, Deputy Null apparently spoke to White, but it does not appear that White was asked about Mendenhall's role in the incident.[13] Cropper confirmed that he did not ask White why Mendenhall was at the crime scene, and was not aware of any such inquiry by any of his colleagues, prior to seeking the arrest warrant. Clearly, a reasonable policeman would have thoroughly examined White before seeking an arrest warrant against Mendenhall, a fellow policeman. Mendenhall explained his subsequent silence to the investigating officers by noting that 1) he answered questions until the officers were asking only whether he had shot Myles, not whether he had any information about the crime;[14] 2) that he was shocked that he was considered a suspect; and 3) that he did not wish to answer these particular questions without an attorney present. Mendenhall's explanation is buttressed by the officers' apparent treatment of White and by the entire tenor of the investigation that preceded Mendenhall's arrest. Reading the

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[12] White was displeased that, even though he was the police officer in charge, as soon as he led the investigators to the scene, they left without questioning him to speak to the ambulance personnel. White was equally dismayed that the investigators then dispatched him to the auto accident, which he claims was outside his jurisdiction. With reference to the crime scene, he stated, "I didn't relinquish it; they took it . . That was my crime scene and they took it ..." He concluded that the investigators "ignored me. They treated me like I was nothing." Adding that "[t]hey ain't asked me nary a question, not one," White stated that he did not volunteer information because the investigators would not have listened to him.

[13] White's deposition testimony suggests that the discussion with Null occurred after the arrest warrant for Mendenhall was issued, but this is not clear.

[14] As the majority notes, Mendenhall apparently told Deputy Newton that his gun had jammed. In the meeting at the station-house, Mendenhall reiterated that he had not shot Myles.

summary judgment record favorably to Mendenhall, it appears that he could reasonably have believed that the officers had unfairly fixed upon him, that they would not have considered information he could have provided pointing away from him or toward another shooter, and therefore that there was no point in speaking to the investigators without an attorney.[15] Such a silence would not provide probable cause for his premature arrest.[16]

I recognize that probable cause is assessed not by any individual factor, but by the totality of the circumstances. See *Illinois v. Gates*, 462 U.S. 213, 241, 103 S.Ct. 2317, 6 L.Ed.2d 527 (1983). I also recognize that, to have qualified immunity, the defendants need only have had a reasonable belief, at the time of arrest, that probable cause exists. See *Hunter*, 502 U.S. at 227, 112 S.Ct. 534 (1991). However, probable cause exists only if, at the time of arrest, "the facts

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[15] As the majority notes, after eight years in the Webster Parish Sheriffs Office, Mendenhall apparently was discharged by Sheriff Riser when Riser took office in June 1996. Mendenhall had been convicted of burglary in Houston in 1987 or 1988. The record clearly suggests enmity between Mendenhall, who is black, and a number of the investigating officers from the Sheriffs Office, all of whom are white. Mendenhall was running for Cullen Police Chief, and the election was to be held on September 21. Cullen is the third-largest city in Webster Parish. After his arrest, Mendenhall, a Cullen native, an NFL Hall of Fame nose tackle and, allegedly, a local hero, narrowly lost the election. The expedited preliminary hearing was not held until September 23.

[16] While remaining silent, Mendenhall apparently stated at the station-house that, if given until Monday, he would provide the evidence he had regarding the shooting. Mendenhall's offer highlights the prematurity of his arrest by suggesting that 1) there was no legitimate rush to take him into custody, and 2) the officers were more interested in arresting Mendenhall than in learning what really happened.

and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that Mendenhall had committed second degree murder. *Id.* at 228, 112 S.Ct. 534. Reading the summary judgment record in the light most favorable to Mendenhall, I am unprepared to conclude that a prudent Webster Parish officer, possessing only the limited and equivocal information that had been produced by a brief investigation targeted at Mendenhall, could reasonably have believed at the time of arrest that Mendenhall was guilty of second-degree murder. Therefore, I disagree with the majority's premature conclusion that, as a matter of law, a reasonable officer in Cropper's shoes could have concluded that probable cause existed for Mendenhall's arrest for the murder of Myles.

Mendenhall's second claim is that the affidavit used to arrest him contained material misstatements or omissions that were made recklessly or intentionally. We have also required, to show a constitutional violation sufficient to overcome qualified immunity, that: 1) the misstatements or omissions have been "of such character that no reasonable official would have submitted it to a magistrate"; and 2) that the misstated or omitted facts be "clearly critical" to a finding of probable cause, such that probable cause would not exist without them. See *Hale*, 899 F.2d at 400-02; *Morin v. Caire*, 77 F.3d 116, 122 (5th Cir. 1996).

The affidavits submitted to the magistrate by Cropper to obtain an arrest warrant for Mendenhall read:

> On the morning of September 13, 1996, approximately 7:30 A.M. a homicide occurred in the middle of the street, in front of 427 Lee Street, Cullen, Louisiana. Witnesses state that they observed John

> Mendenhall, black/male, pull a weapon, assault-style, from his vehicle, chase on foot, fire a shot in the direction of the victim then place the weapon back inside his vehicle, and leave the scene. John Mendenhall was contacted by law enforcement, asking him to make a formal statement and turn over the weapon, but refused. [Search Warrant Affidavit]
>
> [To the best of my knowledge and belief, Mendenhall] did commit in the following manner an offense contrary to law by chasing a black/male by the name of William D. Myles, down Lee St Cullen, Louisiana, armed with a 9 mm pistol, then firing the 9 mm pistol, striking William D. Myles in the back of the head, causing death. After shooting William D. Myles put the 9 mm pistol back into his vehicle, then leave the scene, before talking to Investigating Officers. John Mendenhall had specific intent to inflict bodily harm. Therefore violating L.R.S. 14:30.1, Second Degree Murder." [Arrest Warrant Affidavit][17]

A number of facts apparently material to the magistrate's probable cause determination were omitted from these affidavits. Cropper did not note that Mendenhall was an off-duty police officer who had been asked by White to help him apprehend Myles. Nor did Cropper explain that

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[17] While the first affidavit is technically in support of the application for a search warrant, and the latter an arrest warrant, the two affidavits were apparently submitted together and were both before the magistrate when he decided to grant the arrest warrant. Appellants' claim that both affidavits should be considered together therefore seems reasonable.

Myles was a dangerous criminal who had been firing his gun as he fled the scene of a shooting. Nor, finally, did Cropper note that the relevant witnesses were anonymous, and that a substantially larger number of witnesses did not state that Mendenhall shot Myles.

The summary judgment record also suggests that certain statements in the affidavits were false. In the search warrant affidavit, Cropper claims that "witnesses" provided a vivid picture of Mendenhall pulling a gun and firing it at Myles. However, Cropper himself admitted that, at the time of arrest, no witnesses had told him Mendenhall even fired at all. Ashley, whose anonymous witnesses provided the only purported testimony that Mendenhall killed Myles, also admitted that those witnesses did not see Mendenhall shoot. Therefore, the key factual statement in the affidavit was, the summary judgment record suggests, false.

The arrest warrant affidavit consists entirely of conclusory allegations.[18] With the exception of the statement that Mendenhall left the scene without speaking to investigators, it also appears false. Mendenhall did not fire his pistol, did not shoot Myles, and did not commit second-degree murder.

It appears that the material misstatements and omissions were "clearly critical" to the existence of probable

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[18] To the extent to which this section instead gives the impression that Cropper had firsthand knowledge to support the statements made, Cropper has admitted that impression was false. Cropper did not witness any of the events described in the affidavits. He did not tell the magistrate this, however.

cause.[19] Removing the misstatements would, in essence, leave only the fact that Mendenhall did not speak to investigating officers. This fact alone is insufficient, as Deputy Null admitted, to provide even arguable probable cause for Mendenhall's arrest.

The omitted information regarding the witnesses, notably their anonymity and that they did not see Mendenhall fire his weapon, also appears to have been critical. Likewise, as I have discussed, the omitted circumstances surrounding Mendenhall's conduct, if included, might have defeated the existence of probable cause for his murder arrest. Therefore, the omitted information also appears to have been "clearly critical" to the finding of probable cause.

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[19] The officers have alleged that Cropper engaged in a phone conversation with the magistrate, and provided a number of facts that supplied a basis, beyond the affidavits, for the issuance of the warrant against Mendenhall. However, the officers have not alleged any specifics about what was said, or provided evidence to support their claim that the magistrate did not rely on the affidavits. The only record evidence on the point is Deputy Jimmy Morgan's testimony that he heard Cropper tell the judge that "some of the people up there had told them that John shot him." Morgan could not recall anything else Cropper told the judge; clearly his testimony does not suggest that Cropper's phone statements provided probable cause for Mendenhall's arrest. Therefore, at least in the context of a summary judgment motion against Mendenhall, we must assume that the affidavits were the sole evidence before the magistrate. See *United States v. Jackson*, 818 F.2d 345, 350 (5th Cir. 1987) ("Our review is limited to the affidavit itself because the government presented no evidence to the district court to indicate whether other facts may have been before the magistrate and considered by him in his determination of probable cause."); *Hale*, 899 F.2d at 401 (rejecting claim that other information not in affidavit was provided to magistrate because "Major Jones does not state the substance of this information and cites no place in the record where it may be found.").

The only remaining question is whether, on summary judgment, we are prepared to conclude as a matter of law that 1) the misstatements and omissions were neither intentional nor reckless; or that 2) the misstatements and omissions were not of such a character that a reasonable officer would not have submitted the magistrate. See, *e.g., Hale*, 899 F.2d at 400-02. Reading the evidence in the light most favorable to Mendenhall, I am not prepared to draw either conclusion. As to the misstatements, the officers knew what the witnesses told them. Rather than present what they were told, they apparently mischaracterized the witnesses' statements. They then relied almost entirely on those apparent mischaracterizations and on conclusory statements in seeking an arrest warrant, rather than presenting the facts they did have. In the absence of the apparent misstatements, at the very least a fact issue remains as to whether the affidavit approached a showing of probable cause, and therefore as to whether any reasonable officer would have submitted such an affidavit in search of an arrest warrant. See *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) ("Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.") (internal citation omitted). As to the omissions, we have held that when the omitted facts are "clearly critical" to a finding of probable cause, recklessness can be inferred from proof of the omissions themselves. *Hale*, 899 F.2d at 400.

Therefore, I disagree with the majority's decision to grant summary judgment to the defendants based on sovereign immunity. I would affirm the district court's denial of summary judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

JOHN MENDENHALL,	CIVIL ACTION NO. CV97-1826
VERSUS	JUDGE DONALD E. WALTER
SHERIFF THEODORE RISER JR., and DEPUTIES STEVEN CROPPER, JAMES BELL, ALVA NULL and WAYNE NEWTON	MAGISTRATE JUDGE PAYNE

ORDER

(Filed January 13, 1999)

Pending before this Court are two separate motions in the above-captioned matter,: (1) Plaintiff John Mendenhall's ("Plaintiff') Motion for Partial Summary Judgment, Docket Sheet item 39; and (2) Defendant Sheriff Theodore Riser, Jr. and Defendant Deputies Steven Cropper, James Bell, Alva Null, and Wayne Newton's ("Defendants") Motion for Summary Judgment, Docket Sheet item 36.

As the Court finds that genuine issues of material fact remain in this matter, IT IS ORDERED that Plaintiff s Motion for Partial Summary Judgment, Docket Sheet item 39, be and it is hereby DENIED.

For the same reason, IT IS ORDERED that Defendants' Motion for Summary Judgment, Docket Sheet item 36, be and it is hereby DENIED.

THUS DONE AND SIGNED, in Shreveport,

Louisiana, this the 13th day of January, 1999.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30158

JOHN MENDENHALL

Plaintiff - Appellee

V.

THEODORE RISER, JR, individually & in his official capacity as Sheriff of Webster Parish; STEVEN CROPPER, individually in his official capacity as Webster Parish Deputy Sheriff; JAMES BELL, individually & in his official capacity as Webster Parish Deputy Sheriff; ALVA NULL, individually & in his official capacity as Webster Parish Deputy Sheriff; WAYNE NEWTON, individually & in his official capacity as Webster Parish Deputy Sheriff

Defendants - Appellants

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed July 5, 2000)

(Opinion 5/30/00, 5 Cir., _____ F.3d_____)

Before JOLLY, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.App.P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

EMILIO M. GARZA, Circuit Judge, dissents

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30158

JOHN MENDENHALL

Plaintiff - Appellee

V.

THEODORE RISER, JR, individually & in his official capacity as Sheriff of Webster Parish; STEVEN CROPPER, individually in his official capacity as Webster Parish Deputy Sheriff; JAMES BELL, individually & in his official capacity as Webster Parish Deputy Sheriff; ALVA NULL, individually & in his official capacity as Webster Parish Deputy Sheriff; WAYNE NEWTON, individually & in his official capacity as Webster Parish Deputy Sheriff

Defendants - Appellants

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

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(Filed July 20, 2000)

0 R D E R:

(X) The motion of Appellee for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari. is DENIED.

( ) The motion of Appellee for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including . The stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court advising that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

JOHN MENDENHALL,	CIVIL ACTION NO. CV97-1826
VERSUS	JUDGE DONALD E. WALTER
SHERIFF THEODORE RISER JR., and DEPUTIES STEVEN CROPPER, JAMES BELL, ALVA NULL and WAYNE NEWTON	MAGISTRATE JUDGE PAYNE

JUDGMENT
(Filed August 7, 2000)

On July 24, 2000, the United States Court of Appeals for the Fifth Circuit issued its ruling and mandate in this matter. The Court determined that the officers acted reasonably in arresting plaintiff, John Mendenhall, fur the crime of murder, mid thus, defendants are entitled to the defense of qualified immunity. Accordingly, IT IS ORDERED that the Motion for Summary Judgment [Doc. #36] filed on behalf of defendants, Sheriff Theodore Riser, Jr. and Deputies Steven Cropper, James Bell, Alva Null and Wayne Newton, regarding the issue of qualified immunity be and is hereby GRANTED and all claims against all defendants are DISMISSED WITH PREJUDICE.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 7 day of August, 2000.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 14 2000
CLERK

(2)

No. 00-479

In The

Supreme Court of the United States

JOHN MENDENHALL,

Petitioner,

versus

THEODORE RISER, JR., individually and in his official capacity as Sheriff of Webster Parish; STEVE CROPPER, JAMES BELL, ALVA NULL, and WAYNE NEWTON, individually and in their capacities as Webster Parish Deputy Sheriffs,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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3600

QUESTION PRESENTED FOR REVIEW

A homicide had occurred. Right before it happened, the victim was being chased by a group that included several suspected drug dealers. It looked like an execution-style killing. The crime scene and evidence were distorted. The murder weapon was gone. John Mendenhall tampered with the evidence and contaminated the crime scene. Witnesses identified Mendenhall as the shooter. Empty 9mm shell casings were found. Mendenhall had a 9mm gun that he refused to produce. No other suspects had been named. Mendenhall was evasive. Mendenhall was given the opportunity to clarify matters. He admitted that he had the missing evidence; but he refused to produce it or cooperate in any meaningful way.

1. Whether the Fifth Circuit Court of Appeals correctly found that a reasonable officer could have believed there was probable cause to arrest John Mendenhall, in light of clearly established law and the information possessed by the arresting officers, and thus, the arresting officers were entitled to qualified immunity.

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STATEMENT OF THE CASE

On Friday, September 13, 1996, the Webster Parish Sheriff's Office received a report of a double shooting in Cullen, Louisiana. Sometime before 7:30 a.m., one man was kidnapped, shot, and hospitalized. In a second shooting, just a few blocks away from the first, another man was shot in the back and killed. Webster Parish deputies were immediately dispatched from the Sheriff's main office in Minden, Louisiana, to Cullen.

When deputies first arrived at the scene of the second shooting, they found the dead body of William Myles in the middle of the street. Myles was lying on his back, face up, with a large pool of blood around his head and upper back. There were two guns (a .357 revolver and .25 caliber pistol) and a black ski mask on the ground near his feet. (Record 248, Exhibit 3 (herein "Rec" and "Exh")).

A large crowd of local townspeople had gathered and were obviously frightened and disturbed. Two men had just been shot in their neighborhood in broad daylight. The people were scared and were reluctant to talk to investigators or to get involved. However, two witnesses did tell a deputy that John Mendenhall shot the dead man. (Rec 248, Exh 6, pp. 36, 37, 38, 44, 45).

As the investigation developed, the body was turned over and deputies discovered that William Myles had been shot one time, right in the back of the head. Deputies determined that Myles probably had a pistol at the time of the shooting, but it (a .357 revolver) was empty with no live ammunition. They found out that Myles was probably a gang member from out of town who was involved somehow in a bad drug deal or possibly the

other shooting. They learned that Myles was trying to run away from a group of people chasing him when he was shot in the back. The group pursuing Myles included several suspected drug dealers. (Rec 248, Exh 6, pp. 53, 54).

When Myles was shot, John Mendenhall was on the scene. Mendenhall was one of the group that was chasing Myles just before he was shot. "At the moment" Myles was shot, Mendenhall had a gun "in his hand." (Rec 6).

As Myles, who was on foot, attempted to get away from those in vehicles who were chasing him, he turned around and ran toward his pursuers, and ran right by John Mendenhall's truck. Mendenhall yelled at him to "stop" and "frantically" grabbed a 9mm automatic pistol. Within seconds of running away from Mendenhall, Myles was shot in the back of the head. "At the moment that Myles was shot and killed," Mendenhall had the 9mm automatic "pistol in his hand." Immediately after Myles was shot, Mendenhall, who had been standing by his truck, was standing over Myles' dead body with the 9mm pistol in his hand. (Rec 5, 6, 160, Exh 7).

Mendenhall then tampered with evidence on the crime scene. Before any deputies arrived, Mendenhall picked up the victim's gun (a .357 revolver).[1] He took all the shells out of the gun. Apparently finding no live bullets, Mendenhall then re-chambered six empty shell

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[1] Since Mendenhall left the scene without talking to investigating officers, information about whose gun was lying near the victim had to be derived from other sources.

casings, thereby destroying any fingerprint evidence on the gun and the spent casings. (Rec 160, Exh 1).

Mendenhall contaminated the crime scene with another gun. After he saw there were no live bullets in the victim's gun, Mendenhall went back to his truck and got a gun that he had obtained earlier that morning. Before deputies arrived, Mendenhall placed this other gun (a .25 caliber automatic pistol) and a black ski mask on the crime scene near the victim. (Rec 160, Exh 2).

Mendenhall demonstrated uncanny knowledge about the fatal gun shot. Before medical personnel could determine the nature and location of the fatal wound(s), Mendenhall knew the precise number of fatal gunshots and the exact location of the wound. Mendenhall knew Myles was killed by a "single" shot to the back of the head. Before authorities arrived, Mendenhall told emergency medical personnel (Wayne Walsh) on the scene that Myles was killed by "a single head shot". At that point in time, the body had not been moved. Myles was lying supine in a pool of blood. Myles was on his back, face up, and the back of his head was not visible. The "single head shot" could not be seen. Whether the point or multiple points of entry were in the head, neck, or back, was not discernible. The body was not moved to reveal the gun shot wound until after Mendenhall left the scene. (Rec 160, Exh 4).

Mendenhall removed the homicide weapon from the crime scene. Mendenhall was the only person (other than the dead man) reported to have a gun on the scene at the time of the shooting. Yet, Mendenhall left the scene and

took his gun with him. He then concealed its whereabouts. When he was found later, he refused to produce the gun. (Rec 160, Exh 3).

Mendenhall fled from the crime scene, without talking to any of the investigating deputies. He simply left. (Rec 160, Exh 5). After Mendenhall told the ambulance personnel about the gunshot wound, but before any deputies arrived, Mendenhall left the crime scene. Shortly before 8:00 a.m., Webster Parish Sheriff deputies arrived on the scene. Right after the deputies appeared, Mendenhall returned to the scene, but then he quickly disappeared and was not seen again. He avoided the chance that he might be questioned and avoided the opportunity to tell the deputies what he knew. (Rec 7, .16).

Witnesses identified Mendenhall as the shooter. Deputy Dewayne Ashley was one of the first deputies to arrive on the scene. Deputy Ashley promptly canvassed the neighborhood to find and question witnesses. Most of the people were scared and refused to cooperate. However, two witnesses did tell Ashley that John Mendenhall shot Myles. These two witnesses, like others, did not want to get involved and refused to give their names. Later in the day, Deputy Ashley was at the local hospital to investigate the first shooting victim (Deon Grisby) who had only been wounded in the other shooting at a different location. While in the hospital hallway, Deputy Ashley overheard a conversation in which a third witness said that John Mendenhall shot Myles. Deputy Ashley reported to the investigating deputies that the three witnesses (albeit specific names unknown) had identified Mendenhall as the shooter. (Rec 160, Exh 6).

An eyewitness's written statement implicated Mendenhall. In a written statement, Pamela Neal identified only two people on the street at the time of the shooting – the man who was shot and John Mendenhall. Neal identified only one vehicle – Mendenhall's red truck. (Rec 160, Exh 7). Neal's statement makes *no* reference whatsoever to anyone other than Mendenhall (and the victim) having a gun and makes *no* reference to any vehicle other than Mendenhall's truck being present.

Officers found 9mm shell casings on the scene, and Mendenhall had a 9mm gun. The Mayor of Cullen told investigators that there was so much gunfire when Myles was shot that it sounded "like World War II broke loose." Asked if the shooting sounded like a six-round revolver, the mayor said no, that about 20 shots were fired. (Rec 160, Exh 12). Deputies searched the shooting scene and surrounding neighborhood exhaustively. Despite the witness's description of such excessive gunfire, only two empty 9mm shell casings were found. When Myles was shot in the back, he was heading south on Lee Street, running away from Mendenhall, who was standing to the north of Myles near the corner of Boucher Extension and Lee Street. The two empty shells were found approximately 84 feet to the north of the victim's body near the corner of Boucher Extension and Lee Street. (Rec 160, Exh 8).

These two empty shells were 9mm casings. The 9mm casings were obviously not fired by the victim's .357 revolver. The only other gun reported on the scene at the time of the shooting was Mendenhall's gun. Investigators had information that Mendenhall had a 9mm automatic handgun. The deputies then confirmed that information

by questioning a person (Todd Moore) who had worked on Mendenhall's guns. (Rec 160, Exh 9). Mendenhall's gun was also capable of firing in rapid succession, such that it might sound "like World War II broke loose."

Despite his unique knowledge, Mendenhall concealed his information. During the investigation, it became apparent that if Mendenhall did not actually shoot Myles, then he certainly knew who did. (Rec 160, Exh 10). It was also obvious that Mendenhall either had the murder weapon or he knew where it was. Mendenhall was the only person named as being on the scene with a gun in his hand at the time of the shooting. At the very start of the investigation, two witnesses identified Mendenhall as the shooter. Mendenhall's conduct and the information gathered during the rest of the day corroborated the initial information that pointed toward Mendenhall. (Rec 160, Exh 11). Later that afternoon, deputies sought out Mendenhall to get his version of what happened. But, when he was found, Mendenhall concealed the location of the murder weapon and refused to identify the person who shot William Myles. (Rec 160, Exh 5).

Mendenhall concealed and refused to produce vital evidence. During the day, Mendenhall had numerous opportunities to simply tell deputies what had happened. He had at least four (4) different encounters with investigating officers. Each time, however, Mendenhall concealed critical information and refused to produce the evidence that he had within his control.

First, Mendenhall was evasive and suspicious right after the shooting, when he left the scene. He saw investigating officers securing the area and questioning witnesses. But, rather than provide any information at all to the officers, Mendenhall fled the scene "after a few minutes."

Next Mendenhall concealed and refused to provide information later in the day, when Deputy Newton found Mendenhall at his house. Newton asked Mendenhall "what had happened that morning." Mendenhall admitted to being on the scene with a gun, but would not tell Newton who did the shooting or where the murder weapon could be found. Newton told Mendenhall he needed to come to the police station and "get this mess cleared up" and "to bring all the guns he had with him." (Rec 160, Exh 5; Rec 248, Exh 4, p. 157-159, Exh 5, written statement and p. 36).

Then, Mendenhall refused to answer relevant questions and refused to produce evidence in his possession when he met Deputy Cropper at the Springhill Police Department. After some discussion, Mendenhall confirmed he had a 9mm, but would not let deputies see it. He refused to provide information about the shooter or the murder weapon. (Rec 160, Exh 5; Rec 248, Exh 4, p. 161-167).

Finally, Mendenhall admitted to having "all the evidence," but refused to produce it. After meeting with Deputy Cropper, Mendenhall sought out Deputy Alva Null and talked to him. Deputy Null was Mendenhall's life-long "good friend," and "Someone [he] figured [he] could talk to." However, Mendenhall refused to tell Null

about who shot Myles or where the murder weapon could be located. Instead, Mendenhall told Deputy Null to just "wait" till the next week. Mendenhall said he would then "straighten out all this" and bring them "everything." (Rec 160, Exh 5, p. 196; Rec 248, Exh 4, p. 167-172, 196-197; Rec 7, 8). Mendenhall was not just passively or ambiguously silent, he actively declined to provide information and evidence that he was admittedly concealing, without giving any justification.

It was the "total package" that led officers to believe that Mendenhall was engaged in criminal activity. It was not just one particular fact standing alone, it was everything together, along with Mendenhall's behavior throughout the day. (Rec 248, Exh 6, p. 57).

After Mendenhall told Deputy Hull that he had all the evidence but that he would not produce it, Detective Cropper called and talked with State District Judge Bruce Bolin. Cropper told Judge Bolin the facts and circumstances of the investigation, and he answered Judge Bolin's questions. After discussing the matter with Judge Bolin, two affidavits were prepared, one for an arrest warrant and one for a search warrant. Both affidavits described what the deputies reasonably believed were the facts and circumstances surrounding the death of William Myles. Cropper presented the two affidavits to Judge Bolin at the same time. Judge Bruce Bolin issued an arrest warrant for John Mendenhall and a search warrant for his residence and vehicles. (Rec 160, Exhs 6, 13, 14, 15, 16, 17).

Later that night, Mendenhall was arrested. After he was released on bond, Mendenhall filed a Motion for an

Expedited Preliminary Examination. In this motion, *for the very first time,* Mendenhall came up with his alibi. He identified Ted Nelams as the shooter. This information was not provided to the investigators, but was instead provided to the court and to the district attorney.

After a thorough review of the record, the Fifth Circuit Court of Appeals found that a reasonable officer could have believed there was probable cause to arrest Mendenhall. Accordingly, the Court of Appeals recognized that the arresting officers were entitled to qualified immunity and ordered that summary judgment be granted in favor of the officers.

REASONS FOR DENYING THE WRIT

Mendenhall's Petition does not present a compelling reason as required under Supreme Court Rule 10 for granting a writ. At best, the Petition argues the misapplication of a properly stated rule of law regarding summary judgments, but even that argument lacks merit.

This case does not address a conflict in the circuit nor present an important question of law that calls for an exercise of this Court's supervisory power. Petitioner does little more than assert erroneous factual findings by the lower court.

The case cited by Petitioner, *Reeves v. Sanderson Plumbing Products,* ___ U.S. ___, 120 S.Ct. 2097 (2000), did not announce a new, nor clarify an old rule of law regarding the review of summary judgments. *Reeves* clarified a

conflict regarding the scope of review required in considering a Rule 50 motion for judgment as a matter of law in a jury trial ("record taken as a whole" versus "limited to evidence favorable to the nonmovant"). *Reeves* merely mentioned the summary judgment scope of review ("record as a whole") as an analogy. *Reeves*, at 2110. Contrary to Petitioner's argument, the Fifth Circuit Court of Appeals properly applied the appropriate summary judgment standard and scope of review in this case now before the Court.

A homicide occurred. William Myles was killed by a single gun shot to the back of the head as he ran away from a group of people chasing him. That group included several suspected drug dealers. At the moment Myles was shot in the back, Mendenhall was behind Myles with an automatic pistol in his hand.

Immediately after the shooting, Mendenhall was seen with the automatic weapon, standing over the dead body. Mendenhall was the only person identified on the scene with a gun, other than the victim. Right after the shooting, Mendenhall tampered with evidence, contaminated the crime scene, and then fled the scene without talking to investigators and without revealing the whereabouts of the gun used to kill Myles.

During the investigation, witnesses reported Mendenhall as the shooter. Other evidence corroborated those reports. Throughout the investigation, Mendenhall (allegedly a police officer himself) refused to provide investigating officers with any meaningful information. When found, Mendenhall admitted to having "all the evidence," but, he refused to produce it. Mendenhall

refused to tell investigating officers about who shot Myles, about what happened to the murder weapon, or about why he distorted the crime scene and then fled.

Under the circumstances, the Fifth Circuit Court of Appeals found that Respondents, Sheriff Ted Riser and Deputies Steve Cropper, James Bell, Alva Null, and Wayne Newton, acted reasonably in arresting John Mendenhall, and were thus entitled to qualified immunity.

Petitioner Mendenhall would have this Court set forth a new and unprecedented approach for determining probable cause. Rather than determine probable cause from the perspective of an officer on the street, Mendenhall would have this Court determine probable cause from the perspective of a prime criminal suspect who is known to be concealing vital information and evidence.

The Fifth Circuit was correct in finding a reasonable officer could have believed there was probable cause to arrest Mendenhall. The Petition for Writ of Certiorari should be denied.

I. THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD TO DETERMINE A MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

The Fifth Circuit made an exhaustive and cumbersome *de novo* review of the entire record. *Mendenhall v. Riser*, 213 F.3d 226, 230, 236 (5th Cir. 2000) (herein referred to as Opinion or "Op"). The Fifth Circuit gave "the plaintiff the benefit of doubt with regard to any disputed issues of fact" and viewed the facts "in the light

most favorable to Mendenhall." *Id.* 230-231. "Even after drawing all available inferences in Mendenhall's favor" and viewing the single "factual dispute in the light most favorable to Mendenhall," the Fifth Circuit was "compelled by the facts" to "find, as a matter of law, that a reasonable officer in Deputy Cropper's position could believe probable cause existed to arrest Mendenhall." *Id.* at 236.

Mendenhall has not identified any inappropriate application of the longstanding summary judgment standard of review in the analysis made by the Fifth Circuit.

A. The Fifth Circuit logically and correctly "focused on the identity of the shooter." An arresting officer must know who is shooting before he can consider whether the shooter is justified.

Petitioner attempts to fault the Fifth Circuit Court of Appeals because it "focused on the identity of the shooter, rather than whether the shooting was justifiable." (Petition p. 7). Mendenhall would thus have this Court put the proverbial cart before the horse. He would also have this Court determine probable cause from the perspective of a criminal suspect who is known to be concealing evidence, rather than from the perspective of the officer on the street. Mendenhall's argument is illogical and attempts to distort the common sense foundation for determining probable cause.

The issue before the Fifth Circuit was whether a reasonable officer could have believed there was probable cause to arrest Mendenhall in light of the information

possessed by the arresting officers (not in light of the information which Mendenhall was concealing). The Court of Appeals correctly analyzed the existence of probable cause from the arresting officers' point of view. The reasonableness of an officer's actions "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)

The threshold issue in determining probable cause is whether a crime has been committed. There was a dead man lying in the street with a single gun shot wound to the back of his head. From the arresting officer's viewpoint, a homicide had been committed.

The next issue is to determine whether there is probable cause to arrest. To arrest, an officer must have facts to support a reasonable belief that a particular person had violated or was violating the law. Thus, an officer must decide "who" likely committed the crime.

Logically, an officer can not determine whether a crime is justified without knowing who committed the crime. "A homicide is justifiable: when committed in self-defense by *one* who reasonably believes that *he* [or another] is in imminent danger. . . . " LSA R.S. 14:20. Before an officer can determine if a homicide is justified, the officer must know *who* is the "*one* who reasonably believes that *he* [or another] is imminent danger."

Even if the issue were framed in the way that Mendenhall proposes, there was still probable cause to arrest Mendenhall. Further, the investigating officers could not determine whether the shooter had a reasonable belief

that he or someone else was in danger because Mendenhall was concealing the identity of the shooter and refusing to provide critical evidence about the shooting. Today, a nagging question remains: If the shooting was justified, why did Mendenhall withhold evidence and refuse to explain what happened? Without the information and evidence that Mendenhall was withholding, there was not a justifiable shooting. At the time of Mendenhall's arrest, the officers did not have the facts indicating justification because Mendenhall was concealing those facts.

On the day of the arrest, Mendenhall was acting like a person who had committed or was committing a crime. How did he know about the single head shot? Why did he tamper with the evidence on the scene? Why did he bring a gun and ski mask onto the scene? Why did he leave the scene? Why did he not come clean with Newton? Why did he refuse to turn over his gun for ballistics testing? Why did he answer some questions, but not others? Why did he want the officers to wait till the next week for the rapidly disappearing evidence? Why did he refuse to explain things?

Based on the totality of the circumstances, a reasonable officer could have believed that John Mendenhall shot William Myles. The Fifth Circuit correctly "focused on the identity of the shooter" rather than on whether there was some possibility the shooting was justified.

B. The Court of Appeals correctly drew rational inferences in Mendenhall's favor from the evidence relied upon by the arresting officers.

Mendenhall argues that the Fifth Circuit did not rely on the appropriate evidence. Mendenhall accuses the Fifth Circuit of ignoring the full summary judgment record and choosing to focus on what Mendenhall characterizes as "sketchy" evidence that was "adverse to Officer Mendenhall." (Petition, pp. 8 & 13).

However, the relevant issues determine what evidence is relevant. In this case the relevant evidence is the information the arresting officers possessed. "The relevant question in this case . . . is the objective . . . question whether a reasonable officer could have believed [Mendenhall's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3040 (1987).

Mendenhall is entitled to "reasonable" inferences that may be drawn from the information relied on by the arresting officers. But, Mendenhall is not entitled to unreasonable or implausible inferences or to any and all inferences that an attorney can dream up. The Fifth Circuit expressly drew "all available inferences in Mendenhall's favor." *Mendenhall v. Riser*, at 236. Mendenhall has not identified any relevant instance in which the Fifth Circuit failed to give the proper deference in Mendenhall's favor.

i). Deputy Ashley's Witnesses.

When officers first arrived on the scene, two witnesses affirmatively identified Mendenhall as the shooter. (Rec 160, Exh 6). The information gathered during the remainder of the day corroborated those witnesses. When Mendenhall was given the opportunity to explain, he refused.

For lack of a better explanation, Mendenhall now argues these "mystery" witnesses simply did not exist. (Petition p. 9). But he offers no evidence whatsoever to support his purely speculative argument.

Whatever it was these witnesses saw and heard, it led them to believe that John Mendenhall shot that man. The Fifth Circuit correctly found these witnesses were lawfully considered as an integral part of the probable cause equation.

The "critical distinction" which Petitioner posits is meaningless. It really does not matter that these witnesses did not see Mendenhall's finger squeezing the trigger at the precise moment the shot was fired. Mendenhall was not convicted based solely on what these witnesses said. For purposes of probable cause, whatever minute detail they did or did not see, these witnesses saw and heard something that made them think they saw Mendenhall shoot the man, and that is what they reported.

There is no evidence that these witnesses did not exist. No evidence disputes the existence of these two witnesses. According to Deputy Ashley, these witnesses identified Mendenhall as the shooter. (Rec 160, Exh 6).

There is no evidence to dispute or discredit Deputy Ashley (who was not made a defendant). Deputy Ashley has never refuted, controverted, contradicted, or "backed off" his report about the two witnesses (and neither has anyone else). As the Fifth Circuit recognized, Deputy Ashley "filed his written report, complete with references to these witnesses, on the day of the incident and testified consistent with this report in his deposition testimony taken months later." *Op.* p. 242, FN 11. Mendenhall may not defeat defendants' properly supported motion for summary judgment "by merely asserting that the jury might" not believe a witness. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

Hearsay, tips, and hastily gathered information may be used by an officer in determining probable cause. *Franks v. Delaware*, 438 U.S. 152, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978). Like every other piece of information, these witnesses were not the sole basis for probable cause. The information they provided, the fact that they were there, and the fact that they thought Mendenhall was the shooter, all fit within the overall picture. They were part of the totality. Everything gathered in the investigation corroborated these witnesses.

It is not reasonable nor plausible to infer that this probable cause factor did not exist. The fact that the two witnesses told Deputy Ashley they saw Mendenhall shoot the man is undisputed. There is no evidence to the contrary. The only reasonable inference is that these two witnesses were a piece of the puzzle that could have led a reasonable officer to believe there was probable cause to arrest Mendenhall.

ii). Pamela Neal's Statement.

By declaring that an eyewitness's account "adds nothing to the probable cause calculus," Petitioner exposes his fragmented and selective tunnel vision. (Petition, 9-10). How does the fact that Mendenhall was on the scene with a gun in his hand at the moment of the shooting "add nothing" to a determination that considers the totality of the circumstances? Petitioner's argument defies common sense.

Pamela Neal watched the events unfold from only about sixty feet from the place where Myles was shot. That day she gave investigating officers a written statement. She placed Mendenhall at the scene with a weapon. She made no indication of another person being there with a gun. She did not identify anyone else as being responsible for the shooting. She made no reference to any other person having a weapon. Neal identified only one possible shooter with a gun ("John") and only one vehicle (John Mendenhall's "truck"). "John" was the only person "with a gun in his hand" as Myles "was hitting the ground" at the moment of the shooting. (Rec 160, Exh 7).[2]

Petitioner complains that the Fifth Circuit "refused to draw an obvious inference favorable" to petitioner from Neal's statement. However, even Jimmy White, Mendenhall's half-brother who allegedly sent Mendenhall on

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[2] Petitioner originally claimed that Neal's written statement included everything she told the officers that day about the shooting. (Rec 36). Now, however, Petitioner says it means "nothing."

the mission to get Myles, thought that Mendenhall was the shooter when he came on the scene and saw Mendenhall with the gun. (Rec 303).

In addition to her written statement, Neal gave a deposition in this litigation in which she claimed to have also given oral statements to the officers. The Fifth Circuit carefully reviewed the entire record. It examined each of Neal's written and oral statements in detail. It specifically found that Neal's statements did not create a material fact issue. "The mere existence of *some* alleged factual dispute" is insufficient; the dispute must be over a "*material* fact. . . . Only disputes over facts that might affect the outcome of the suit under the governing law" can be defined as material. *Anderson v. Liberty Lobby*, at 2510.

Under the governing law, Neal's oral statements do not affect the outcome of the qualified immunity issue. The issue is "whether a reasonable officer could have believed probable cause existed to arrest Mendenhall." *Op.* p. 236. "[A]ffording these statements appropriate weight . . . , reading them in conjunction with her handwritten statement which excluded any reference to this other man, and considering the totality of the remaining evidence pointing to Mendenhall as the shooter," a reasonable officer "could still conclude probable cause to arrest existed." *Op.* p. 236.

The Fifth Circuit did not, as Petitioner argues, "disregard" Neal's statements. The Fifth Circuit expressly considered the statements, but unlike Petitioner's fragmented approach, the Fifth Circuit considered the statements in light of the totality of the circumstances. In

that light, any dispute regarding the statements is immaterial.

iii). Mendenhall's Knowledge of the Fatal Wound.

Petitioner complains that the Fifth Circuit went "out of its way to draw an adverse inference" from Mendenhall's statement to medical personnel that Myles was killed by a "single head shot." Like the position he takes regarding Neal's statement, Mendenhall argues that his own statement about the fatal wound means "nothing."

When Mendenhall made the statement, it was *very* unusual. The timing, substance, and precision of the eerie observation were disquieting. The victim's fatal wound "was not immediately evident, as Myles was lying face up in the road. . . . In fact, Wayne Walsh, a trained emergency medical technician, could not determine the nature of the injury until the body was 'rolled.' " *Op.* p. 232, FN 7.

The record clearly establishes that Mendenhall's conduct and knowledge were suspicious. Investigators questioned how Mendenhall could have such knowledge. (Rec 215, Exh D, p. 15-16). Before the Court of Appeals, Mendenhall admitted that the information was "curious." "Curiosity here may have invited questions" about Mendenhall's unexplained knowledge of the exact location and nature of the entry wound which no one could see. (Appellee Brief, pp. 21-22). Mendenhall now admits that deputies knew he was on the scene and in a position to have unique knowledge about the shooting. He obviously knew what occurred. Yet, Mendenhall, who claims he was

acting as a police officer himself, simply left. He refused to cooperate with investigators and would not explain what happened or how he knew or what he knew about the single head shot.

If at any time during the day "Officer" Mendenhall would have just told the deputies what happened, he would not have been arrested (if it happened as he now claims). But Mendenhall did nothing to dispel the mounting evidence, instead, Mendenhall continued to actively conceal critical information and evidence.

iv). Fingering, Distorting and Contaminating Evidence.

Mendenhall again accuses the Fifth Circuit of going "out of its way" to draw an adverse inference by "characterizing his conduct as 'tampering with evidence.' " But Mendenhall's argument is meritless.

Wayne Walsh, who heard Mendenhall's statement about the head shot, also witnessed "Mendenhall pick up a silver revolver that was lying at the feet of the victim, unchamber the rounds of ammunition in the weapon, examine them, replace them in the chamber, and then place the weapon back on the ground. . . . " *Op.* p. 235.

In his deposition, Mendenhall admitted that his conduct was suspect and anything but standard. He likely would have moved the body, but he thought he "was making enough boo-boo's as it is." *Op.* p. 232, FN 8. Mendenhall literally violated LSA R.S. 14:130.1: "Obstruction of Justice" and LSA R.S. 14:134.2: " . . . Tampering with Evidence." Mendenhall intentionally altered, moved, removed, and added objects at the scene which

he knew or had good reason to know would be the subject of an investigation by law enforcement officers.

Mendenhall's argument relies exclusively on Mendenhall's articulation of his own subjective motives as an explanation for distorting the crime scene. His current excuses about his own motives are irrelevant and immaterial. The relevant issue is the information known to the arresting officers at the time of the arrest. Since Mendenhall refused to explain his subjective motives, they were not known to the arresting officers, and are simply irrelevant.

The evidence is undisputed that Mendenhall tampered with evidence. That information alone could have served as the basis for probable cause to arrest. *Op.* p. 243, FN 19. That evidence was correctly factored into the overall probable cause determination along with every other piece of the puzzle the investigators found.

v). Two Spent Nine Millimeter Shell Casings.

Petitioner's argument that the two 9mm shell casings could be exculpatory rather than incriminating is not supported by evidence and is logically and legally flawed.

Petitioner claims that the two shell casings were found "where Pamela Neal had told the deputies the 'green car' shooter" was located. That statement is not correct; there is no evidence to support it. The two spent 9mm shells were found lying only 10 inches apart right next to the *west* edge of Lee Street near the corner of Boucher and Lee where Mendenhall was standing. (Rec

160, Exh 8). The green car which Pam Neal allegedly described was on the *east* side of Lee Street beside a "little sewer tank." (Rec 248, Exh 9). Also, the alleged "green car shooter" was specifically described as firing only *one* shot. This alleged "shooter" was crouched down behind the door between the car and the sewage tank on the *east* side of the green car. The casings were all the way over the car on the west side of the street. Simply because the casings were found somewhere on Lee Street does not change the law that a non-movant is entitled to only reasonable, not fantastic, inferences.

Likewise, as discussed earlier, Pam Neal's references to the "green car shooter" are not material, and thus cannot be used to create a triable issue. Considering the totality of the evidence pointing at Mendenhall, a reasonable officer could have believed the two 9mm shell casings along with the information that Mendenhall had an automatic 9mm weapon added to the probable cause equation.

vi). Mendenhall's Evasiveness and Refusal to Cooperate.

While arguing before the Fifth Circuit, Mendenhall admitted that it was "reasonable . . . [for] investigators to wonder about why the plaintiff left the scene . . . before talking to Investigating Officers" (Appellee Brief, pp. 22, 33), and that his "leaving might perhaps be a curious matter. . . . " (Appellee Brief, p. 35).

Now, however, Mendenhall argues that the Fifth Circuit impermissibly drew the wrong inference when it found that "shortly before investigating officers Cropper

and Null arrived at the scene, Mendenhall simply left, without offering any statement concerning the events of the day. His sudden absence from the scene of a homicide, without any explanation, warranted further inquiry in the minds of lead investigators. . . . It was his voluntary, premature exit from the scene, before he could even be asked about the day's events, that led investigators to first question his role in Myles' shooting death." *Op.* p. 232-33, FN 9. Obviously, consistency is not a means of reaching the end which Mendenhall seeks.

After Mendenhall fled the scene, investigators realized that Mendenhall either did the shooting or knew who did. "In an attempt to obtain Mendenhall's version of events, Deputy Newton paid a visit to Mendenhall, at his residence. In response to inquires as to the day's events, Mendenhall . . . said he chambered a round in his handgun . . . but it jammed. He then refused further comment." *Op.* p. 235.

Later that day, Cropper questioned Mendenhall at the station house "concerning the shooting, beginning with questions as to whether Mendenhall possessed a nine-millimeter weapon. Mendenhall apparently answered those initial questions, but as soon as the interview focused more intently on the morning's events, Mendenhall refused to provide additional information" and got up and left. *Id.*

Afterwards Deputy Null talked to Mendenhall. Again, Mendenhall refused to provide any substantive information, saying only that if the deputies would just wait until Monday, he "would provide them with all relevant evidence concerning the shooting." *Id.*

In Mendenhall's Petition, he tries, as he did below, to ignore the fundamental principles of probable cause. Rather than consider the totality of the circumstances, Mendenhall attempts to isolate details and argues that a particular isolated fact does not establish probable cause. However, there was not just one incident where Mendenhall refused to answer questions; it was his conduct throughout the day. He had several opportunities to explain his conduct, but each time he was evasive and refused to cooperate.

Mendenhall argues that his evasiveness was justified because he thought deputies "ignored him" and he was "piqued." As the Fifth Circuit recognized, "Mendenhall's purported motivation in refusing to answer questions is irrelevant." *Op.* p. 235.

The fact that a suspect refuses to cooperate and answer questions may be used by an officer to find probable cause. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Mendenhall's silence was not just passive; it was an active refusal to provide vital evidence. His silence was a continuous, suspicious harboring and concealing of critical information. According to this Court, "Silence in the face of accusation is a relevant fact. . . . Silence is often evidence of the most persuasive character. . . . " *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 1558 (1976). Silence, evasiveness, and a suspect's refusal to answer questions are relevant facts that can be used to establish probable cause. *Hunter v. Bryant*, supra. In the context of qualified immunity, such silence can certainly be considered in determining whether a reasonable officer could have believed there was probable cause. *Id.* 112 S.Ct. 537.

From the arresting officers' perspective, homicide evidence was disappearing and being distorted quicker than they could gather it. The arresting officers knew that Mendenhall, who had a prior felony conviction, was on the scene of a violent homicide with a gun in his hand. (Rec 160, Exh 3, pp. 181-82). Mendenhall had tampered with, destroyed, and removed critical evidence from the crime scene. The local townspeople witnessed what appeared to be an execution-style shooting and were afraid to talk. Mendenhall was intimately involved and knew exactly what happened, and how it happened. Yet, Mendenhall, who was supposedly a police officer himself, refused to cooperate and refused to turn over vital evidence that he had in his possession. From the investigator's perspective, it simply did not make sense for Mendenhall to withhold and conceal information, *if he had clean hands*. Also, considering Mendenhall's conduct throughout the day, any further delay would worsen the exigent circumstance that evidence might be further moved or destroyed. *U.S. v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

Throughout the investigation, the facts pointing toward Mendenhall continued to mount. It was not just one or two isolated facts. It was everything taken as a whole. Mendenhall was given several opportunities to exculpate himself; however, he refused. Instead, he evaded officers, concealed vital information, withheld evidence, and incriminated himself further.

II. THE COURT OF APPEALS CORRECTLY CONSIDERED MENDENHALL'S "SILENCE" AS GROUNDS FOR PROBABLE CAUSE.

Petitioner's argument regarding post-*Miranda* silence lacks merit for the same reasons just discussed in the section above captioned "vi). Mendenhall's Evasiveness and Refusal to Cooperate." It was not just one instance of withholding or concealing evidence, it was Mendenhall's conduct throughout the entire day that led officers to believe there was probable cause to arrest him.

Petitioner cites the case of *Doyle v. Ohio*, 426 U.S. 610 (1976) for the proposition that a "reasonable officer would know" that the use of post-*Miranda* silence should not be used in determining probable cause. *Doyle* does not stand for such a proposition. Such a bright line rule is not clearly established.

Doyle does not completely exclude the use of post-*Miranda* silence, even at a criminal trial. *Doyle* does not address the use of an alleged police officer's flight from a crime scene and his subsequent evasiveness and refusal to cooperate. *Doyle* does not address an alleged police officer's blatant refusal to turn over evidence of a homicide. Moreover, *Doyle* does not address the use of silence in the probable cause analysis. An isolated and elusive evidentiary ruling has not created a hard and fast rule for the officer on the street grappling with a maze of rapidly developing, convoluted information. There are numerous factors that may lawfully be considered in determining probable cause that are ultimately not admissible at trial. *Doyle* has not changed that law.

Not only is *Doyle* inapposite from a legal point of view, it is also factually irrelevant. Each time that Mendenhall was "silent", he had not just been read his *Miranda* rights. Further, at the station house after he was read his rights, it was not just his "silence," it was also the fact that Mendenhall refused to produce his gun for ballistics testing. Even Mendenhall admits there was probable cause to seize the gun. The fact that "officer" Mendenhall refused to produce evidence which he knew there was probable cause to seize is clearly a permissible factor in the probable cause analysis.

Clearly established law says that silence is a relevant fact which can be used to establish probable cause. *Hunter v. Bryant,* supra; *Baxter v. Palmigiano,* supra. The arresting officers did not violate clearly established law when they considered Mendenhall's evasive conduct throughout the day as indicative of probable cause.

III. THE COURT OF APPEALS PROPERLY FRAMED THE QUALIFIED IMMUNITY INQUIRY.

According to the Fifth Circuit, the "inquiry now before us" is "whether a reasonable officer could have believed probable cause existed to arrest Mendenhall." *Op.* p. 236. This is the exact "formulation" which Mendenhall says the Fifth Circuit "should have" used. Petition, p. 15.

There is no difference in the outcome between formulating the qualified immunity test as (1) whether the facts support a finding that "a reasonable officer could have believed probable cause existed to arrest Mendenhall" or (2) "whether the facts . . . support a finding that no

reasonable officer could have believed probable cause existed." It is an objective inquiry using the "reasonable officer" (akin to the "reasonable man") standard. If a reasonable officer could have believed there was probable cause, then there is qualified immunity. If no reasonable officer could have believed there was probable cause, then there is no qualified immunity.

So, what is the problem? Petitioner is arguing with the law. He does not like qualified immunity, and so he simply declares that it is wrong. He offers no alternative. The test for qualified immunity is well established. Petitioner's attempt to semantically dissect and confuse the law has no legal, logical, nor grammatical foundation.

The case cited by Petitioner, *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (2000), does not change the law of qualified immunity. The case mentions the words "qualified immunity," only in passing, and then only to say it was not relevant to the case. Contrary to Petitioner's argument, *Williams*, a case dealing with the law of habeas corpus, did not modify or affect the "doctrinally distinct law of qualified immunity." *Id.* 1506, FN 12. Likewise, Petitioner's criticism of *Babb v. Dorman*, 33 F.3d 472 (5th Cir. 1994) is unfounded. *Babb*'s analysis has never been reversed or criticized by any authority. Petitioner's argument is no more than argument for the sake of argument.

CONCLUSION

Based on the totality of the facts and circumstances, a reasonable officer could have believed that it was lawful to arrest Mendenhall.

Mendenhall is not an innocent "victim of police misconduct . . . most deserving of a remedy – the person who in fact has done no wrong, and has been arrested for no reason." *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986). Mendenhall was a police officer who tampered with evidence. He distorted and contaminated the crime scene. He put a throw-down gun on the scene and then disappeared. He knew who did the shooting, and he knew the location of the murder weapon. Yet he purposely chose to conceal all this information. Mendenhall claims he was entitled to some special treatment because he was a police officer. However, as a police officer, Mendenhall's conduct was "plainly incompetent." He was trained to enforce the law, yet, Mendenhall "knowingly violated the law." Now, he seeks to benefit from his own criminal behavior. He is asking this Court's blessings, and he should be denied.

Respectfully submitted,

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